OCT 10 1887

# IN THE SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1886.**

**No. 2.**

WILLIAM CRAIG'S EXECUTOR,
*Appellant,*
v.
THOMAS LEITENSDORFER'S ADMINISTRATOR,
*Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EIGHTH CIRCUIT AND DISTRICT OF COLORADO.

## SUPPLEMENTAL BRIEF FOR APPELLANT.

O. D. BARRETT,
BENJ. F. BUTLER,
*of Counsel.*

XIV.

**The decree is erroneous because it is not limited to the cancellation of the evidence of title to so much of the land as was vested in Craig at the time the decree was passed.**

The complainant put in evidence the fact that prior to the passing of said decree 71, 638 acres of the lands awarded to Craig had been by him conveyed to others (R. 457–8), but the complainant did not make any of Craig's grantees parties to the suit, nor introduce evidence tending to show that said grantees had any knowledge of the pendency of this suit, notwithstanding the Colorado Statute make the filing of a formal *lis pendens*, the only constructive notice of the pendency of the suit; and there is nothing in the record showing any such *lis pendens* was ever filed.

The statute provides—

> "In an action affecting the title to real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, where affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties to and the object of the action, and a description of the property in that county affected thereby, and the defendants may also, in such notice, state the nature and extent of the relief claimed in the answer. From the time of filing such notice, only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby."

(Code of Civil Procedure, of the State of Colorado, chapter 3, section 38, page 13.)

BENJ. F. BUTLER,
O. D. BARRETT,
*of Counsel for Appellee.*

23-189

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## SUPPLEMENTAL BRIEF FOR APPELLANT.

O. D. BARRETT,
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# INDEX.


| | Page |
|---|---|
| Our review limited to portions of appellee's briefs | 1 |
| No proper party appellee in the case | 2 |
| No interest in the intestate at the time of his death | 2 |
| Suit relates only to freehold estate, hence administrator is not proper party appellee | 3 |
| Case of Barribeau *v* Brant, 17 Howard, 43 | 3 |
| No estate or interest in Leitensdorfer at time of his death | 3 |
| King and Allen are not parties | 3 |
| Character of interest claimed by appellee | 4 |
| Craig denies that appellee had any interest in grant | 5 |
| Evidence of Hallum in that regard | 6 |
| Case of Vattier *v.* Hind, 7 Peters, 253 | 6 |
| No resulting trust | 7 |
| No expressed trust because not in writing | 8 |
| Colorado Statute relating to trusts | 8 |
| Perry on Trusts, section 162 | 9 |
| Appellee's interest, if any, conveyed to Farnsworth | 10 |
| Quotation from Mitford's pleadings | 11 |
| Lands described in bill not part of Las Animas grant | 12 |
| Appellee was not a "derivative claimant" | 22 |
| Meaning of term as used in the law | 23 |
| Averments of bill as to title | 23 |
| Evidence as to title | 26 |
| Appellee conveys to Baird in 1867 | 26 |
| Baird not in possession at date of act in 1869 | 27 |
| Appellee claims reconveyance in 1872; said conveyance of 1872 ineffectual to convey title | 27 |
| Appellee acquired nothing in the grant after 1872 | 28 |
| Appellee claims that suit may be maintained though he had no interest, and refers to authorities | 31 |
| Percheman *v.* United States, 7 Peters, 51, review | 31 |
| United States *v.* Patterson, 16 Howard, 10, review | 31 |
| United States *v.* Sutter, 21 Howard, 270, review | 31 |
| Castro *v.* Hendricks, 23 Howard, 438, review | 31 |
| Appellee's claim and estate of Mrs. Farnsworth is bound by this suit, is discussed | 35 |

| | Page |
|---|---|
| Delivery of original deed to Leitensdorfer discussed | 36 |
| Future gifts to colonists | 37 |
| Appellee's claim of separate property by act of 1869 discussed | 38 |
| Power of attorney does not embrace after-acquired property | 39 |
| Deeds from Eugene and Thomas Leitensdorfer to Baird were not nullities | 40 |
| Deeds void as to creditors, not void as to grantors themselves | 41 |
| Confirmation of grant by Surveyor-General | 42 |
| Appellee not damaged by any fraud he has alleged | 43 |
| Appellee's discussion of Florida commissioners reviewed | 44 |
| Duties of register and receiver in this case not executive | 45–47 |
| Section 453 Revised Statutes quoted | 47 |
| The duties therein described examined | 48 |
| Section 1 act 1836 referred to | 49 |
| Right of appeal to commissioner | 49, 50 |
| Register and receiver's duties in this case judicial | 50 |
| Appellee's claim that original grant is void discussed | 51 |
| It is an empresario grant | 52 |
| Quotation from petition | 52 |
| Method of obtaining empresario grants | 53 |
| Section 4 of act 1824 discussed | 55 |
| Eleven square league limit discussed | 55 |
| Section 12 of act of 1824 quoted from original Spanish | 55 |
| Translation of said section | 56 |
| "Abrevadero," meaning of | 56 |
| "Comopropiedad," meaning of | 56 |
| Empresario might have obtained private grant for eleven leagues | 57 |
| Our colonial empresario grants referred to | 57 |
| Duty of governor, not of empresario, to forward espediante | 58 |
| United States disclaimed all right of property by virtue of conquest | 58 |
| United States acquired the land as an individual | 58 |
| Illustration above | 59 |
| Acts of confirmation by Congress not equivalent to new grant | 61 |
| Johnson *v.* Towsley, 13 Wallace, 72, discussed | 61 |
| VanWyck *v.* Knebals, 106 U.S. 360, discussed | 62 |
| Suit cannot be maintained in name of individual to cancel the certified plat | 64 |

Page

Attorney-General Wirt's opinion, 1st opinion, 300, reviewed . 64
Opinion Attorney-General Wirt, 1st opinions, 458, reviewed . 64
Opinion of Attorney-General Legere, 4th opinions, 120, reviewed . . . . . 65
Opinion Attorney-General Clifford, 4th opinions, 558, reviewed
Shepley *v.* Cowan, 91 U.S. 530, reviewed . . . . . 66
Moore *v.* Robbins, 96 U.S. 330, reviewed . . . . . 66
Little *et al. v.* Arkansas *et al.*, 9 Howard, 314, reviewed . . 66
Cunningham *v.* Ashley, 14 Howard, 377, reviewed . . . 67
Barnard's Heirs *v.* Ashley's Heirs *et al.*, 18 Howard, 43, reviewed . . . . . 68
Newhall *v.* Sanger, 92 U.S. 761, reviewed . . . . . 69
Vance *v.* Burbank, 100 U.S. 514, reviewed . . . . . 69
United States *v.* Stone, 2 Wallace, 536 . . . . . 69
United States *v.* Minor, 114 U.S. 233 . . . . . 69
United States *v.* Hughes, 11 Howard, 252 . . . . . 69
Hughes *v.* United States, 4 Wallace, 232, reviewed . . . 69
United States *v.* Throckmorton, 98 U.S., reviewed . . . 69
Field *v.* Seabury, 19 Howard, 323, reviewed . . . . . 70
Silver *v.* Ladd, 7 Wallace, 219, reviewed . . . . . 71
Carroll *v.* Safford, 3 Howard, 441, reviewed . . . . . 71
Steele *v.* Smelting Company, 106 U.S. 447, reviewed . . 71
Act of Congress relating to commissioner's supervision . 70

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

WILLIAM CRAIG'S EXECUTOR, *Appellant*,
*v.*
THOMAS LEITENSDORFER'S ADMINISTRATOR, *Appellee*. } No. 2.

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE 8th CIRCUIT AND DISTRICT OF COLORADO.*

## SUPPLEMENTAL BRIEF FOR APPELLANT.

Since our brief was filed in this case we have received two from the appellee, aggregating one hundred and twenty-one pages. A thorough review of the matters treated in them and of the authorities quoted would fill many hundred pages. We shall, therefore, confine ourselves to pointing out a few of the mistakes made by the appellee, and some of his errors in the application of the authorities he has quoted; but we by no means admit those parts of the briefs to which we make no reference, or that the proper application has been made of the authorities quoted. Our excuse is want of time, on our part, to properly discuss the entire range of executive administration and judicial procedure pertaining to both public and private land claims, and a supposed want of time and inclination on the part of the Court to consider the great mass

of decisions made by clerks, heads of divisions, and commissioners of the General Land Office.

## I.

### There is no proper Party Appellee in this case before the Court, and the Suit has abated.

This fact was brought to the knowledge of this Court in January, 1886, by the affidavit of the appellee, Thomas Leitensdorfer, filed as "Exhibit U," to rule to show cause, that he ceased to have any interest in the lands in question in this suit as early as the eighteenth day of December, 1880, by reason of a voluntary conveyance of the same, that day made by him, to Josephine Farnsworth.

In the argument of said motion to show cause, appellant maintained that said voluntary assignment by appellee of all his said interest abated the suit (appellant's brief on motion to show cause, page 12), and he still claims that the suit abated from the time said fact was made known to this Court, basing this claim on the ground, among others, of the peculiar nature of the interest Leitensdorfer claimed to have in the land in question; which peculiar nature we will examine and explain in section II.

The appellee, Leitensdorfer, died in April, 1886, and his death was suggested to this Court on the first day of the next term; and on the same day an order was passed, on an *ex parte* application, making his administrator a party appellee, and he is now sole appellee in this case.

If the intestate at the time of his death had no interest in the subject matter of this suit, it is evident that no probate court could vest any interest in it in his administrator.

As the suit relates solely to freehold estate, it is evident that no interest in it could vest in the administrator, even if the intestate had retained an interest in it up to the time of his death.

The case of *Barribeau* v. *Brant*, 17 How. 43, is in point. Pierre and Euphrasie Barribeau filed their bill in equity against the defendant Brant, and prayed for the cancellation of certain deeds made by them to a lot in St Louis, Missouri. Soon after commencement of suit, Pierre conveyed all his interest in the lot to Massey in trust for a natural daughter. The Court below dismissed the bill and plaintiffs appealed. Pierre died pending the appeal. Massey moved this Court to be made a party appellant.

In overruling that motion, this Court said: "The only "persons who, upon principles of law and the rules of this "Court, can be permitted to appear in his stead, are those "who on his death succeed to the interest *he then had*, and "upon whom the estate then devolved."

> (See Story's opinion in case of *Slack* v. *Wolcott*, 3 Mason, 508, as to law of reviving suits. Only personal representatives can revive by bill of revivor. Others must resort to original bill in nature of, &c.)

As at Leitensdorfer's death, there was no estate or interest in him to devolve on any one, he having conveyed to Farnsworth. It is respectfully submitted that his administrator can have no standing before this Court, and that the suit abates.

King and Allen have filed bonds for costs, but this does not make them parties to the suit, or either of them, nor lay the foundation for them to become parties.

## II.

### Character of the Interest claimed by Leitensdorfer in the Lands in Controversy.

This question is discussed to some extent, on page 18 of our original brief, to which we refer, as follows: —

"We have seen that Leitensdorfer claims a resulting trust "under a deed in which a consideration of twenty-five thou- "sand dollars is expressed. It is respectfully submitted that "no resulting trust can be maintained under such a deed, and "that therefore Leitensdorfer is shown to be absolutely dis- "qualified, for want of any interest in the subject matter of "the suit, to maintain it."

But in case the Court shall hold that his claim to a resulting trust can be maintained under such a deed, it is then respectfully submitted that, in order to maintain the suit, he should have made the trustee a co-defendant in the suit, so that the property which he claims might be bound by the final decree which the Court might render in the case.

By the statutes in certain states, a trustee can maintain or defend a suit without his beneficiary being made a party, but we have failed to find any statute or any rule of court that ever permitted a beneficiary under a trust to maintain a suit in relation thereto in which the trustee was not joined either as a co-plaintiff, or as a defendant.

It is laid down by Daniels, in his work on Chancery Pleading and Practice, page 192, that —

"Where a plaintiff has only an equitable right in the thing "demanded, the person having the legal right to demand it "should be a party to the suit; for, if he were not, his legal

"right would not be bound by the decree, and he might, not-
"withstanding the success of the plaintiff, have it in his
"power to annoy the defendant by instituting proceedings to
"assert his right in an action at law, to which the decree in
"equity, being *res inter alias acta*, would be no answer. . . .
"This complication of litigation, it is against the principles
"of equity to permit, and therefore requires that in every
"suit, all the persons who, having legal rights to the subject
"in dispute, as well as the persons having the equitable
"rights, should be made parties to the proceedings. Upon
"this ground it is that in all suits by persons claiming under
"a trust, the trustee or other person in whom the legal estate
"is vested, is required to be a party to the proceedings. . . .
"The rule is the same, whether the trust be expressed or
"only implied." . . .

Thus, on the complainant's own showing, the legal title to the lands claimed by him being in Josephine Farnsworth, he cannot maintain this suit, she not being a party to it.

Craig in his answer denied Leitensdorfer's claim to an interest in the grant, a fact which he could have well maintained by putting in evidence the deed from Thomas Leitensdorfer to John Hallum, to which Hallum refers in his evidence (Rec. page 84). He says: "Thomas Leitensdorfer, in 1873, in the
"month of June, conveyed the Leitensdorfer interest in the
"Las Animas grant to me. One half of said interest was
"conveyed to me by him for my own use, and to secure coun-
"sel to prosecute his claim. The other half was to me in trust
"for himself, and he yet owns one half of the said Leitens-
"dorfer interest. I conveyed the half interest which I so held
"in trust for him, about ten months afterwards, to Josephine
"Farnsworth, his sister, in trust for him, though there is no

"trust expressed on the face of either of the conveyances "mentioned."

A copy of the latter deed is found in the record, page 172. It shows a consideration on its face of $25,000. The other deed is not in the record. But the evidence of Hallum is sufficient for our purpose. He says that Leitensdorfer conveyed a half interest to him for his own use, and that the other half was embraced in the deed, and that there was not any trust expressed upon its face. Hallum was a lawyer, and he well knew that a valuable consideration was necessary to vest the title in him, and therefore his evidence makes out a *prima facie* case that the deed was for a valuable consideration expressed therein. For the present let us assume that Thomas Leitensdorfer had a resulting trust as claimed by his counsel. Then the case stands as follows: He avers title in himself in his bill; Craig denies it in his answer, and the plaintiff thereupon admits in his evidence that he had theretofore conveyed away all his interest by deed to Hallum, but that Hallum became a trustee to him to the extent of one half of the interest in the lands thus conveyed, although there is no trust expressed on the face of the deed.

In a very similar case this Court has held that the complainant could not maintain his suit.

In the case of *Vattier* v. *Hind*, 7 Pet. 253, Thomas S. Hind, and Belinda, his wife, brought a suit to cancel a deed to a certain tract of land. "The answer resists the "claim, because the land had been conveyed by the plaintiffs, "before the institution of their suit, to Alexander Cum- "mings. The plaintiffs, in their replication, admitted the "execution of the deed to Cummings, but averred that it "was made in trust to reconvey the same rights to the said

"Thomas, to be held by him in trust for the use and benefit "of the said Belinda and her heirs, and to enable the said "Thomas the more conveniently to manage, litigate, and "protect the said rights; and that the said Alexander "Cummings did afterwards, in execution of the said trust, "make a deed to the said Thomas, which is recorded in the "proper county. The deed referred to is exhibited, but "expresses no trust for the wife and her heirs" (page 274).

The Court held this to be a departure, and refused the relief, though there is nothing to show that the facts set up in the replication were not true. The Court said: "This "cause came on to be heard on the transcript of record from " . . . This Court is of opinion that to entitle themselves "to the decree which was pronounced in their favor, the "plaintiffs in the Circuit Court ought to have stated their "case truly in their bill, as it now appears on the record; "and that after the amended answer was filed, showing the "deed from Thomas S. Hind, and Belinda, his wife, to Alex- "ander Cummings, the plaintiffs ought to have obtained "leave to amend their bill, so as to introduce into it the "reconveyance from Alexander Cummings to Thomas S. "Hinds on the trusts agreed on between the parties, instead "of alleging this new matter in their replication." The Court denied the relief, and remanded the cause.

If Hind *et als.* could not protect themselves by setting up the true facts in their replication, much less can Leitensdorfer protect himself by denying the averments of the answer, and then by confessing and seeking to avoid them in his evidence.

Thus, granting that Leitensdorfer held a resulting trust under his deed to Hallum as claimed by him, it follows, from the case above referred to, that he cannot maintain his

suit. But appellant maintains that upon the facts disclosed in the evidence of Hallum, Leitensdorfer had no interest in the lands in question at the time this suit was instituted.

Hallum's evidence leaves no reasonable doubt that according to the face of the deed to him, all the grantor's interest in the land in question passed to him. This was absolutely essential to the accomplishment of the very object for which Hallum says Leitensdorfer's entire interest was conveyed to him, to wit, to conceal the fact of any ownership in the land remaining in Leitensdorfer; but no trust can result to a *grantor* under his deed, which on its face is sufficient to convey the property absolutely.

*Squire et ux.* v. *Harder et al.*, 1 Paige, Ch. Rep. 494;
*Williams on Real Property*, 157, and note 1.

If the deed did not, on its face, express a valuable consideration, then it was insufficient to convey the Leitensdorfer ownership. If it did express such a consideration, then no parole evidence can be received to change or vary the effect of the deed.

1 *Greenleaf's Ev.* sec. 26, note 1.
*Perry on Trusts*, sec. 162.

Hallum's evidence leaves no doubt that he entered into *an express* agreement with Leitensdorfer to take a conveyance of his entire interest in the land in question and to hold one half of the same in secret trust for him.

No trust can result from such an agreement, and under Colorado statutes no trust can thus be created. The statute of that state requires the trust not only to be *proved* by writing, but also to be *created* by writing. It is as follows: —

"No estate or interest in lands, other than leases for a

"term not exceeding one year, nor any trust or power over "or concerning lands or in any manner relating thereto, shall "hereafter be created, granted or assigned, surrendered or "declared, unless by act or operation of law, or by deed or "conveyance in writing, subscribed by the party creating, "granting, assigning, surrendering, or declaring the same, "or by his lawful agent, thereunto duly authorized by writ- "ing" (*Act* 1861, *Colorado General Statutes*, *page* 508).

This subject is thoroughly discussed in Perry on Trusts, sec. 162. After stating the law on this subject as to common law conveyances, showing how resulting trusts may arise under them, he adds: "This rule does not apply to modern "conveyances, and no trust is now held to result to a grantor "although he conveys his estate without consideration. At "the present day, almost all conveyances are in form deeds of "bargain and sale, and operate to pass the estate by virtue "of the statute of uses, or of statutes in the several states "prescribing the formalities necessary to convey lands. "Under the statute of uses, the bargain between the bar- "gainor and the bargainee, and the consideration raised a use "in the bargainee, the statute immediately stepped in and "vested the legal title in the same person for whom a bene- "ficial use had been raised by the bargain. In conveyances "that are in form deeds of bargain and sale, parol evidence "cannot be received to control or contradict the statement "of the consideration. Such a statement is a solemn and "essential part of the deed, and its existence cannot be "disproved by parole. . . . To allow parol evidence to "raise a resulting trust upon such deeds would be to break "in upon the expressed purposes of the statute of frauds. " . . . And where the deed contains a clause, as most "deeds do, that the estate is had and held by the grantee, "his heirs and assigns, to his and their use and behoof, no

"trust can result, as it is a rule that when a use is declared, "no other use can be shown to result. And when a deed "contains covenants or warranty, no use can result to the "grantor, for such covenants estop him from claiming any "legal or beneficial interest in the estate."

Even if it be possible from Hallum's evidence to find a resulting trust in Leitensdorfer under his deed to Hallum, still it is impossible to find a trust resulting to any person under Hallum's deed to Farnsworth. A copy of that deed is in the record, and found on page 172.

The consideration named in it is "the sum of twenty-five "thousand dollars;" the granting words are: "Hath given, "granted, bargained, aliened, sold and conveyed, and by "these presents doth give, grant, bargain, alien, sell and "convey." And the *habendum* clause is as follows: "To "have and to hold unto the said Josephine Farnsworth, his "heirs and assigns forever."

This deed comes within the rule laid down in Perry, and the same doctrine has been followed by the Supreme Court of the State of Colorado in the case of *Learned* v. *Tritch et al.*, 6 Col. 432, in a case very similar to the present. The doctrine is most elaborately discussed and followed in the case of *Whiting* v. *Gould*, 2 Wis. 552, to which reference is made, and also to the numerous authorities there quoted in support of the same.

Appellant, therefore, claims that there was no interest of any kind in the lands in question vested in Thomas Leitensdorfer at the commencement of this suit.

But suppose that Thomas Leitensdorfer, at the commencement of this suit had, as claimed by his attorney Hallum, in his deposition (Rec. p. 84), a resulting trust, under his con-

veyance to Hallum, and under Hallum's conveyance to Farnsworth.

The fact was disclosed to this Court, at its last term, that said alleged interest had vested in his alleged trustee, Farnsworth, by Leitensdorfer's voluntary conveyance to her of December 18, 1880. The suit having proceeded from the time of said assignment up to the last term without disclosure of said assignment, the effect upon the suit is the same as if the deed had been made at the time of its disclosure.

Lord Redesdale says: "The voluntary alienation of prop-"erty pending a suit by any party to it is not permitted to "affect the rights of other parties if the suit proceeds without "disclosure of the fact" (*Mitford's Eq. Pleadings, page* 73).

The question therefore is to determine what is the effect of a voluntary conveyance made by a sole appellee, who was sole complainant below, during the pendency of an appeal, of all of his interest in a suit, when such interest is limited to a resulting trust, and when such conveyance is made to the trustee whose trusteeship commenced prior to the institution of the suit, and who had never been a party to it.

The effect of the conveyance is not to transfer the beneficial estate to the trustee, but is simply to end the beneficial estate absolutely, just as the death of the life tenant, or the conveyance by the life tenant to the remainder-man, ends absolutely the life estate. The two estates cannot have a separate existence in the same person at the same time, and the result is stated by Lord Redesdale as follows: —

"If the interest of a plaintiff or defendant, suing or de-"fending in his own right, wholly determines, and the same

"property becomes vested in another person not claiming "under him, as in the case of an ecclesiastical person succeed- "ing to a benefice, or a remainder-man in a settlement becom- "ing entitled upon the death of a prior tenant under the same "settlement, the suit cannot be continued by bill or revivor, "nor can its defects be supplied by a supplemental bill."

*Mitford's Pleadings, page* 72; 2 *Blackstone*, 337, *note* 61, *Sharswood's ed.*

III.

**But if the Court be of the opinion that this suit was maintainable by Leitensdorfer and can now be maintained by his personal representative, notwithstanding said deeds to Hallum and Farnsworth, still we submit that it cannot be maintained, because complainant's own evidence fully establishes the fact that the lands claimed by Leitensdorfer "on behalf of himself and others," are not within the boundaries of the Las Animas grant.**

For an abstract of that evidence, we refer to the fourth point of our original brief, as follows: —

The complainant, in his bill (Rec. 37), specifies the lands he claims by section, fractional section, and range, but he nowhere in his bill alleges that said lands are within the boundaries of the original grant made to Vigil and St. Vrain.

The defendant Craig, in his answer (Rec. 62), "alleges "that the said sixteen thousand acres included in the said "pretended derivative claim of plaintiff is not, nor is any "part thereof, within the limits of the Las Animas grant, "and the said plaintiff has never lived upon or within the "limits of said grant, or settled upon or improved any land "within the limits of said grant."

All the evidence offered as to the initial point of the survey of the grant is in the plat of the grant found in the record opposite page 347, purporting to be a copy of the original on file in the office of the Surveyor-General of New Mexico, the boundaries of the grant given in the act of juridicial possession (Rec. 253), and the depositions of six witnesses.

The description in the act of juridical possession is, "Commencing on the line north of the lands of Beaubien "and Miranda, at one league east of the Animas river, a "mound was erected; thence following in a direct line to "the Arkansas river, one league below the junction of the "Animas and Arkansas. The second mound was erected on "the banks of said Arkansas river."

Now the first mound is, by the plat and by the language in the act of juridical possession, specifically located in the line of the northern boundary of the Miranda and Beaubien grant. By the plat it is also on the line of said grant at a point eastward of the crossing of said boundary line by one branch of the Animas river, and westward of another branch of said river. The distance east of the first crossing is specifically fixed as above at one league.

CALVIN JONES, on behalf of Leitensdorfer, testified as follows (Rec. 432): —

"*Q.* State where the beginning corner of this grant is.

"*A.* It is one league south of south fork of the Purga-"toire; I judge it to be thirty or thirty-five miles from here "[Trinidad]. The grant is now called the Maxwell grant, "but the proper name is the Beaubien-Miranda grant; I "mean where the two grants come together.

"*Q.* State as near as you can the direction of initial "point for Las Animas grant, from Trinidad.

"*A.* I would judge it to be a southwest course from here."

WILLIAM A. BRANSFORD, on behalf of the complainant Leitensdorfer, testified as follows (Rec. 436) : —

"*Q.* Do you know the southeast boundary of the Las "Animas grant?

"*A.* I will give a description as I have read it. It com- "mences one league south of the headwaters of the Purga- "toire, running east to intersection of the Arkansas one "league below the mouth of the Purgatoire.

"*Q.* Describe the headwaters of the Purgatoire.

"*A.* There are two forks; one heads in back of Wana- "hatoya, northwest of Trinidad; the other, the main branch "of the river, heads up towards Red river, southwest of "Trinidad."

PORCHEUS L. WOOTTON, on behalf of the complainant Leitensdorfer, testified as follows (Rec. 444) : —

"*Q.* State where the beginning point of the grant is, and "state if you were ever there, and who was with you.

"*A.* I have seen the beginning point, as shown to me by "Governor Bent, who owned a part of the grant, and it is "on the top of Snowy range; it is on Beaubien-Miranda line, "about fifty-five miles from Trinidad, the way a man would "have to travel."

THOMAS O. BOGGS, on behalf of complainant Leitens- dorfer, testified as follows (Rec. 435) : —

"*Q.* Are you acquainted with the south boundary of the "Las Animas grant?

"*A.* He says, I understood it commenced at the northern "line of the Beaubien-Miranda grant.

"*Q.* At what point of the Baubien-Miranda grant does the "Las Animas grant commence, and in what direction from "there does the southern line run, and to what point?

"*A.* Commencing at northeastern boundary, and running "and striking the Arkansas river one league below the "mouth of the Las Animas river."

While the matter was pending before the register and receiver, the defendant, William Craig, appeared before the register, February 6, 1873, in his own behalf, as a witness, and his evidence, so taken, was, by the defendant Leitensdorfer, filed in this cause as his, Leitensdorfer's, evidence. On this point in question, Craig testified as follows (Rec. 319): —

By the register:

"*X-Q.* 5. State whether you are acquainted with the "southeasterly or most easterly boundary of the Las Animas "grant; state the source of your knowledge touching said "boundary, and describe what portion of the valley of the "Purgatoire, if any portion thereof, lies to the west of said "eastern boundary.

"*A.* I have been at and shown by Ceran St. Vrain what "purported to be the initial boundary of the Las Animas "grant, which was represented by a mound of rocks, and said "to be on the northern boundary of Miranda and Beaubien "grant, and a league east of the source of the Purgatoire."

ALBERT W. ARCHIBALD was also a witness while the matter was pending before the register and receiver, and on Feb-

ruary 6, 1873, he made a deposition before the register, which deposition complainant Leitensdorfer has filed on his own behalf in this cause. Said Archibald testified as follows (Rec. 321): —

"As United States Deputy Surveyor, in connection with "A. B. Sheldon, I surveyed the exterior lines of township "31, 32, 33, and 34, in ranges 65, 66, 67, and 68, in the year "eighteen hundred and sixty-seven, and the south boundary "of township 34, in range 69 west. The source of the "south fork of the Purgatoire river is in township 34, south "of range 70 west. I am acquainted with the northern "boundary of the Miranda and Beaubien grant, according to "the description of said grant as given in the original deed "of conveyance from the Mexican authorities to Miranda "and Beaubien.

"*Int.* 3. State where a stake placed one league east of the "Purgatoire river, in township 34 south, range 70 west, and "on the northern line of the Miranda and Beaubien grant, "would be placed.

"*A.* 3. The line of the Miranda and Beaubien grant does "not extend as far west as range 70, on a line with township "34 south.

"*Int.* 4. State where the proper location would be of a "stake on the north line of the Miranda and Beaubien grant, "one league east of the Purgatoire river.

"*A.* 4. From the surveys I have made and the examination "of the field notes of other deputy surveyors employed by "the government, I believe that the only point that can be "found on the north boundary of grant of Miranda and "Beaubien and a league east of the Purgatoire river, is near "the centre of township 34, south of range 66 west."

And on cross-examination said ARCHIBALD testified as follows (Rec. 323) : —

"*Int.* 7. How do you know that the point near the centre "of township 34 south, range 66 west, is on the northern "boundary of the Miranda and Beaubien grant?

"*A.* 7. My reason for supposing it, is that it is on the "summit of the mountain referred to in the description of "the north line of said grant, as above described by me, "being continuation of said mesa, and lying west from it, "and that it is about one league east of a point on the south "fork of the Purgatoire river."

Thus the complainant Leitensdorfer has produced in this cause the evidence of five witnesses, all combining to establish the fact that the initial point of the survey of the Las Animas grant was southwest from Trinidad, and on the line of the Beaubien and Miranda grant, one league easterly of the south fork of the Purgatoire river, the deputy surveyor Archibald saying it was about the middle of the township, 34 south, range 66 west, that is, the middle of the north line of said township.

The witness Boggs is less definite in his evidence. It does not necessarily differ from the other five, because any point in the entire northerly line of the boundary of the Baubien-Miranda grant is, in fact, the northeast boundary, as the entire line, from end to end, bears northwest and southeast at some points making a greater angle with the meridian than at others.

The above is all the evidence in this record relating to the location of the initial point of said survey, and all of it is the complainant's evidence put into this cause by his attorneys.

There is no question as to the location of the northeast

corner of said grant. All agree that it is on the Arkansas river, one league below its junction with the Las Animas river, and consequently a right line connecting that point with the initial point of the survey must be the southeasterly boundary of the Las Animas grant.

As the initial point is at the middle of the north line of township 34 south, range 66 west, and the other point, as may be seen on any Land Office map of Colorado, is very near the middle of the north line of township 23 south, range 51 west, it follows that the latter point is fifteen townships east and eleven townships north of the former. In running said line from the initial point, in the language of the surveyor's art, the latitude would be to the departure as eleven to fifteen, or as four and four tenths ($4\frac{4}{10}$) miles to six (6) miles.

An inspection of the plats in the record, opposite page 285, shows that the land claimed by Leitensdorfer nearest to the southeast boundary of the Las Animas grant is the northwest corner of sec. 22, township 32 south, range 63 west, to a point just three (3) townships or eighteen (18) miles east of the initial point of the survey, and just one and a half ($1\frac{1}{2}$) townships, or nine (9) miles, north of said initial point. But a simple calculation shows that said boundary line, in making eighteen (18) miles departure, makes thirteen and two tenths ($13\frac{2}{10}$) miles latitude, thus demonstrating that said point of land of the Leitensdorfer claim nearest to said boundary is four and two tenths ($4\frac{2}{10}$) miles south of it, and about three and a half ($3\frac{1}{2}$) miles from the nearest point of said boundary. It is true that four of the six witnesses testify that the lands claimed by Leitensdorfer are within the boundaries of the Las Animas grant, but two of them, Craig and Archibald, testify that the southeast boundary line of the Las Animas

grant leaves the lands claimed by Leitensdorfer a considerable distance to the southeast of the grant.

But it is respectfully submitted that, the complainant's evidence having fixed the two termini of said boundary land in relation to the public surveys, and the junction of two prominent rivers, it is competent for the Court to examine those surveys, to see for itself where on the earth's surface said line would run in connecting said termini.

*Indianapolis R.R. Co.* v. *Stephens*, 28 Ind. 429.
*Atwater* v. *Schenk*, 9 Wis. 160.
*Prieger* v. *Exchange Ins. Co.*, 6 Wis. 89.

It follows that the evidence of the four witnesses, given to the effect that the Leitensdorfer claim is within the Las Animas grant, must be disregarded as in conflict with their own evidence in fixing the termini of the southeast boundary line. That the location of the line, it being a right line, must be determined by its termini rather than by guess-work of witnesses whose evidence fails to show that they were experts in the matter pertaining to boundary lines.

Even if the Court could not from the government surveys be permitted to determine for itself the location of the boundary line in its relation to the lands claimed by Leitensdorfer, the evidence of the deputy surveyor, Archibald, as to said location, ought to prevail over that of all the rest in conflict with him, because he alone is, by the evidence, shown to be qualified to form an opinion to which any weight can be given as to the location of said lines in relation to said lands. Especially is this true since Archibald's evidence is brought into this case by Leitensdorfer, and he cannot be permitted to contradict his sole competent witness

by the evidence of others who are not shown to be competent to form an opinion in relation to the matter.

It is respectfully submitted that the complainant's evidence conclusively shows that the lands claimed by him are exterior to the boundaries of the Las Animas grant, and that consequently Leitensdorfer never had any standing whatever in court in this case.

The reply of the appellee's counsel to said fourth point is found in their supplemental brief, pages 6 to 19.

In response to that reply it is sufficient to say : —

*First.* Their own evidence collated in our brief (pages 26 –29), establishes the initial point of the boundary of the grant on the north line of the Beaubien and Mirande grant at a point not farther east than the centre of township 34 south, range 66 west.

*Second.* That the second monument of the survey of said grant was erected on the right bank of the Arkansas river, at one league below its junction with the Las Animas.

*Third.* That these two points or corners of the grant were, according to the language of the act of juridical possession, connected by a straight line, the language of that act being "a una legua al este del rio de las Animas se puse "una mohonera, y de hay seguiendo *una linea recta* hasta el "rio Nepeste, una debajo de la confluencia de las Animas con "el mismo Nepeste" (Rec. page 250) ; the English translation of which is as follows: "At one league east of the Animas "river a mound was erected; thence following a [right?] "direct line to the Arkansas river, one league below the junc-"tion of the Animas and Arkansas, the second mound was

"erected on the banks of said Arkansas river" (Rec. p. 253).

*Fourth.* That such straight line connecting said two points will run to the north-west of the so-called Leitensdorfer tract, is shown by every government map of that region of country.

*Fifth.* That the location of the Animas river as plotted by the alcalde on his *diseno* cannot control the line of the boundary between said two points, because no allusion is made to it as a boundary.

*Sixth.* The fact that several of the witnesses, after having located definitely the initial point of the boundary, gave their opinion that said tract was within the boundary of the grant, can have no weight to control the character of the line connecting the first and second corners of the grant.

*Seventh.* Counsel's declaration that it makes no difference in this case whether the land in question is within or without the grant, is simply an admission of the extraordinary weakness of their position. If their reasoning is correct, then it would make no difference whether their land was situated in Colorado or Alaska.

If the Court shall be of opinion, however, that the sixteen thousand acre tract in question lies within the boundaries of the Las Animas grant, the next step in the natural order of investigation will be to determine whether Thomas Leitensdorfer was a "derivative claimant" in the sense in which that term is used in the act of Congress relating to said grant.

The term "derivative claimant" is first used in relation to

this grant in the third section of the act of February 25, 1869, which reads as follows: —

"That upon the adjustment of the Vigil and St. Vrain "claims, according to the provisions of this act, it shall be "the duty of the Surveyor-General of the district to furnish "proper approved plats to said claimants, or their legal rep- "resentatives, and so in like manner to said *derivative* "claimants, which shall be evidence of title."

In the act of 1860 no claimants are referred to but Vigil and St. Vrain, and "*actual settlers holding possession under* "*titles or promises* to settle which have heretofore been given "by said Vigil and St. Vrain." As there are but two classes of claimants mentioned in this act, the term "*derivative* "*claimant*," must be confined exclusively to those who were "*actual settlers* holding possession under titles or promises "to settle . . . given by said Vigil and St. Vrain."

The act of 1869, however, refers to Vigil and St. Vrain as the original grantees; also to "actual settlers upon the "tracts heretofore claimed by said Vigil and St. Vrain, hold- "ing titles or promises to settle, which have been made by "said Vigil and St. Vrain or their legal representatives." This is the first allusion in any of said acts to "legal repre- "sentatives," and the term as here used is evidently limited in its meaning to *personal* representatives of Vigil and St. Vrain, one or both. In this act two other classes of claimants are provided for: those claiming by pre-emption and those claiming under the homestead law; but they were not to receive certified plats as evidence of title. It therefore follows that the term "derivative claimants," as used in the third section above quoted, applies exclusively to those who

were actual settlers holding possession under title or promises to settle from Vigil and St. Vrain.

The only other place in said acts where the term "derivative claimants" is used, is in the resolution of April 28, 1870, which reads as follows: —

"That so much of an act approved February 25, 1869, ". . . as required that *derivative claimants* under Vigil and "St. Vrain shall establish their claims to the satisfaction of "the register and receiver of the proper land district, within "one year from the passage of said act, shall be so construed "as to authorize the presentation of such *derivative* claims "within one year from the completion and approval of the "sub-divisional surveys contemplated by said act of the 25th "of February, 1869."

The resolution above quoted giving no different meaning to "derivative claimants" must therefore be held to be limited, in its application to this grant, to the actual settlers who were in possession under titles or promises to settle from Vigil and St. Vrain, if claiming under the act of 1860, or under Vigil and St. Vrain, or their legal representatives, if claiming under the act of 1869.

Has Thomas Leitensdorfer made such averments in his bill of complaint, and established the same by his evidence, as to enable the Court to find, as a fact, that he was one of the actual settlers, holding possession under the title or promises to settle from Vigil or St. Vrain, at the time of the passage of said act of 1860, or at the time of the passage of the act of 25th of February, 1869?

The averments of his bill of complaint in that regard are as follows: —

"That on the 7th of March, 1844, at Taos, said Cornelio "Vigil and Ceran St. Vrain executed a donation of an undi- "vided one-sixth of said inchoate grant to Eugene Leitensdor- "fer, under whom Thomas Leitensdorfer, the complainant "herein, now holds.

"That in 1844, it appears the said grantees executed like "donations of an undivided one-sixth to each of the persons, "Charles Bent, Donaciano Vigil, and Manuel Armijo; that in "1844, as thus appears, an undivided one-sixth of said "inchoate grant vested in each of the six persons above men- "tioned; namely, Cornelio Vigil, Ceran St. Vrain, Eugene "Leitensdorfer, Charles Bent, Donaciano Vigil, and Manuel "Armijo; that said six shares have never been enforced by "a formal petition" (Rec. page 33).

"Thirty-nine derivative claimants presented their claims " . . . to the register and receiver. That among them was "the derivative claim . . . of Thomas Leitensdorfer, com- "plainant herein under Eugene Leitensdorfer; that the "deed of said Vigil and St. Vrain was for one sixth of the "grant; that is to say, for about six hundred and eighty-two "thousand seven hundred and twenty-four and one sixth acres " (Rec. page 36).

"That complainant, in filing his claim before the register "and receiver, made an equitable reduction of it to twenty-five "sections," which sections complainant specified by number, township, and range.

**"That said derivative claims of complainant, as thus "reduced, does not conflict on the ground with the "derivative claim of said defendant, William Craig.**

"That complainant produced evidence before the register "and receiver to establish substantially the preceding allega- "tions of this bill, and the continuous inhabitancy and culti- "vation of his claim by himself since May, 1862, which "inhabitancy and cultivation still continues" (Rec. page 37).

The record does not contain a copy of the original deed in

Spanish from Vigil and St. Vrain to Eugene Leitensdorfer, but Donaciano Vigil, one of complainant's witnesses, swears that said conveyance was for "*one undivided one-sixth* of all "their interest in the entire grant" (Rec. page 288).

Willim Gilpin, another witness for complainant, swears that the Eugene Leitensdorfer interest in said grant was one undivided sixth (Rec. page 291).

Thus the averments of the bill, and the evidence offered by complainant in support of the same, leave no possible doubt that the interest in the grant conveyed to Eugene Leitensdorfer was limited to an undivided sixth, and that no part of the grant was conveyed to him in severalty.

Next, Eugene conveyed said undivided interest in the grant to S. M. Baird (Rec. page 286) before the confirmatory act of June 21, 1860, was passed, up to which time neither he nor Baird had become an actual settler on the grant.

The actual possession, and the extent of the same, that Thomas took on the grant is fully set forth in the evidence of his own witness, James S. Gray, in substance as follow, (Rec. page 301): That he, Gray, as agent for St. Vrains measured off about 1200 acres on the Las Animas river and gave him possession of the same. That said Leitensdorfer built his house about the centre of said 1200 acres; that said tract measured on line of river two and one half miles, and in width from 1200 to 1600 yards. That all the lands lying between said tract and some point above Trinidad were then in the possession of other settlers to whom said Gray had duly allotted them; the names of whom said Gray gives in his eleventh answer in said deposition (Rec. page 303), and the extent of the tracts given to each.

He further testified, in substance (Rec. page 305), that this tract of land was not distinct and separate from that claimed by Eugene, but that it is a part of the same; and then to the question "Do I understand you to say that "Eugene Leitensdorfer or Spence M. Baird made a deed to "Thomas Leitensdorfer of the specific land now claimed by "Thomas Leitensdorfer?" he answered: "The way I under- "stood the deed was that Eugene made it, as the agent of "Spence M. Baird, for the undivided one-sixth part of the "entire grant, but not for any particular part, for then it "was undivided, and is yet."

Thus the title stood until 1867, when Thomas Leitensdorfer, complainant, according to his own evidence, conveyed, with the exception of ten acres, all his interest in said grant to S. M. Baird, testifying, however, that he made the deed *to save his property from his creditors* (Rec. page 312). He further says that there was no consideration; but he does not say there was no consideration expressed on the face of the deed, and the presumption is that, as the deed was made to save the lands from his creditors, it was in form sufficient to do it, and therefore contained a consideration expressed on its face. Such a deed is one from which no trust can result to a grantor, and any agreement made by parole that Baird should hold said land in trust, is absolutely void under the statute, as we have shown elsewhere.

As he was not in possession of any part of the grant when the act of 1860 was passed, he could receive no benefit from that, as an actual settler, because neither he nor any grantor of his was then, or ever had been, an actual settler on the grant.

There is no evidence that Baird went into possession of said land prior to the act of 25th of February, 1869. At

the date of that act, therefore, Thomas Leitensdorfer's ownership, according to his own evidence, had been reduced to an undivided one-sixth part of ten acres of the grant, and his actual possession under any title or promise to settle, had been reduced to said ten acres. Hence there is nothing to show that Thomas Leitensdorfer should posibly derive any benefit from the act of 1869, save as to said ten acres, and there is no evidence to show that said ten acres formed any part of the sixteen thousand acre tract described in the bill of complaint.

But it is claimed that the interest he conveyed to Baird in 1867 was reconveyed to Thomas in 1872, by deed, a copy of which is found in the record, page 294. If this deed were sufficient to transfer any title, which we deny, it could not convey any right under the act of 1869, for there is no evidence that Baird had acquired any right under that act to convey.

That said last-mentioned deed is ineffectual to convey title is fully shown in our brief in support of motion to reverse, &c., pages 19 to 22, to which we refer as follows: —

In 1869 or 1870 said Baird filed his claim for said land before the Surveyor-General, under the provisions of said act of February 25, 1869, that in filing the same he uses the following language: "One sixth ($\frac{1}{6}$) in my own right," &c. See Rec. page 378, and certificate of Surveyor-General found on page 379, which bears date April 20, 1870.

Thus, as late as 1870, Thomas Leitensdorfer's interest in the grant was limited to his one undivided one-sixth of the ten acres he expected out of his conveyance of 1867 to Baird.

When the time for acquiring by settlement any further

rights of property in the Las Animas grant ended, Thomas' right, as we have seen, was limited to an undivided one-sixth of ten acres, and there is nothing in the record to show that he ever acquired right or title to any larger share or part of the grant, unless it was done under deed, a copy of which is found in the record, page 294.

There is no possible doubt that Spruce M. Baird was the man to whom Thomas conveyed in 1867. In Thomas Leitensdorfer's deposition, Rec. 312, relating to said conveyance, the name Spruce M. Baird, as the grantee, is used in the questions and answers eighteen times.

The deed above referred to purports to have been made by Eugene Leitensdorfer as attorney, but it is ineffectual to convey the title out of Spence M. Baird:

*First.* Because the only authority shown to Eugene Leitensdorfer to make any deed as attorney for any one, is found on page 295 of the record, it being a power of attorney bearing date February 24, 1860, and consequently made long before Baird acquired the specific title in 1867, which Eugene Leitensdorfer by this deed attempted to reconvey to Thomas. There is no clause in it making it applicable to after-acquired property, but is limited by its terms to such property as the maker of the power had at its date. Appellee claims that because the word "may" is used in the power, that it is broad enough to include after-acquired property, but he refers us to no authority applicable to powers which must always be construed in strictness against the person acting or claiming under them. If it had been intended to make this power applicable to after-acquired property, a very few words would have been sufficient for that purpose; but they are not found in it, and the term "may have," under the general rules of construction as to

powers, must be limited to what the maker had, or may have had, at the time of the making of the power.

*Wright* v. *Ellison*, 1 Wal. 16.

*Second.* This power of attorney is the same one under which this same Eugene Leitensdorfer claims to have conveyed this same interest in this same grant to the same Thomas Leitensdorfer on 1861. Consequently, it became *functus officio* in the execution of the deed of December 10, 1861.

*Third.* It is ineffectual to convey said title, because in the granting part of the deed Eugene Leitensdorfer claims to be acting as the agent of L. M. Baird, and not as the agent of Spruce M. Baird, in whom was the title of the land, and there is nothing in the signature to the deed, "S. "M. Baird," to show that the intention was to act for "Spruce "M. Baird," and there is nothing in the certificate of acknowledgment to determine the question or throw any light upon it, inasmnch as the acknowledgment of the deed is made by Eugene Leitensdorfer as his own deed, and not as the deed of L. M. Baird, S. M. Baird, or Spruce M. Baird.

*Fourth.* This deed is ineffectual to convey said title, because the same was vested in Spruce M. Baird, and the power of attorney purports to have been made not by Spruce M. Baird, but by Spence M. Baird. This is the name used in the first line of the power, "know all men by these pres- "ents that I, Spence M. Baird," &c. It is signed "S. M. "Baird," but as the signature is insufficient to show whether it was made by Spruce M. Baird, the name Spence in the first line must control.

The power is not acknowledged, and the original is not produced, the paper put in evidence purporting to be a copy; thus no aid can be had from any examination of the handwriting of the signature.

We therefore respectfully submit that all title in and to the land in question that was in Thomas Leitensdorfer in 1867 is shown to have passed from him to Spruce M. Baird in that year, and that there is nothing to show that the same ever afterwards revested in Thomas Leitensdorfer.

There is no allegation in the bill of complaint, or evidence in the record, tending to prove that Spruce M. Baird, or his heirs and assigns, ever ratified the conveyance attempted to be made by the last-mentioned deed, or that they, or any of them, ever received any consideration or benefit therefrom. The record shows that this deed was made on the twentieth day of May, 1872; that it was recorded on the first day of June, and that Spruce M. Baird died on the fifth day of June of the same year.

It is therefore respectfully submitted that Thomas Leitensdorfer took nothing by said conveyance, and that his interest, as appears from the record, at the time of the death of said Baird, was limited to his undivided one-sixth interest in the ten acres which he had expected in his deed to Baird of 1867.

There is nothing in the bill of complaint alleging, or in the evidence proving or tending to prove, that Thomas Leitensdorfer ever acquired any interest of any kind in the grant, subsequent to June, 1872.

No claim is made that complainant acquired any interest in the lands in question subsequent to May 22, 1872.

The effect of the subsequent conveyances made by Thomas Leitensdorfer to Hallum, and to Farnsworth, is fully dis-

cussed under our first point in this supplemental brief, to which we refer; and we respectfully submit that the record does not show that Thomas Leitensdorfer, at the commencement of this suit, was, in respect to any part of the 16,000 acre tract described by him in his bill of complaint, a derivative claimant, in the sense in which that term is used in said acts of Congress relative to the Las Animas grant.

Appellee, on page 2 of his brief, endeavors to bring this suit within the decision of the following cases; to wit, —

*United States* v. *Percheman*, 7 Pet. 51.
*United States* v. *Patterson*, 15 How. 10.
*United States* v. *Sutter*, 21 How. 170.
*Castro* v. *Hendricks*, 23 How. 438.

All these cases arose under special laws, whose object was to enable the United States to determine what lands, in ceded territories, belonged to the public domain, and what lands were held in private ownership. The question to be determined in the first three was as to the validity or invalidity of the original grant, and in neither case was there more than one claimant; consequently no contest in those suits between derivative claimants arose.

The fourth case relates solely to a survey by the Surveyor-General. As soon as the United States ascertained, through these suits, that any piece of land in question was not public land, it in effect disclaimed ownership, gave a quitclaim deed to any party before the Court who showed any claim to it, but with the express proviso, in each case, that it should not in any manner interfere with the rights of third parties. An examination of these cases will show that there is nothing whatever in them on which appellee can lean for support. We will examine them in their order.

In the Percheman case, the question as to parties arose as follows: Percheman brought suit against the United States for the confirmation of a Florida or Spanish land grant.

Among other defences, the United States answered: "That Percheman had conveyed all his interest to Sanchez" (page 57).

Percheman amended his petition and stated: "That the "sale was a conditional sale and no more" (page 58).

The Attorney-General in argument contended "That the "suit could be maintained only by Sanchez" (page 59).

Counsel for Percheman responded that the deed conveyed no title, and that the contract was to be void unless the title was confirmed (page 81).

In deciding the case, this Court said: "It was very truly "observed by the Territorial Court, that this objection is "founded altogether on a suggestion of a private adverse "claim; but adverse claims, under the law giving jurisdic- "tion to this Court, are not to be decided or investigated. "The point has not been made in this Court" (page 97.)

Thus it appears that the Territorial Court was of the opinion that the question presented by the alleged assignment to Sanchez, was one in the nature of a private adverse claim. If we examine the special law giving jurisdiction of the case (IV. U.S. Stat. at L. chap. LXX. p. 284), we find that section 8 excludes this class of questions, and that section 13 specially provides one the "decree shall be conclusive be- "tween the United States and said claimants only."

It necessarily follows, that the Percheman case, arising under a special law restricting the question before the Court to that between the United States and the claimant, cannot control in a case where the only contest is under the gen-

eral law governing equity proceedings, in a suit between different claimants under the same grant.

*Patterson's case* (15 How. 10) arose under the Missouri act of May 26, 1824 (IV. U.S. Stat. at L. chap. LXX. p. 284), revived and applied to Louisiana by the act of June 17, 1844 (IX. U.S. Stat. p. 676).

Patterson claimed the land in question as the assignee of the heirs of William Barr. He not having proved the assignment from the heirs to him, the Court, in confirming the grant, provided that it should not be to the prejudice of Barr's heirs, but directed that it should be for the use of the *legal representatives* of William Barr, deceased; thus leaving the question to be decided in another suit, as to whether Patterson was, or was not, the legal representative of Barr, as to this tract of land.

It will be observed that this claim was not prosecuted in the name of the original grantee, but in the name of him who claimed the latest assignment from the legal representatives of the original grantee, and that the Court did not provide that the confirmation should enure to the benefit of the claimants and *his grantees*, but that, on the contrary, it did provide that his alleged *grantors* might have the benefit of it in case his alleged assignment from them should not be sufficient to carry title. But the matter before the Court in this suit was to determine the validity, or invalidity, of the original grant, and not for the adjudication of the rights of "derivative claimants," as between themselves under the original grantee.

The Sutter case arose under the act of 1851, relating to Spanish-Mexican grants in California.

Sutter presented his claim to the commissioners under sec-

tion 8 of that statute (6th United States Statutes, 631), and stated in his petition, that he and his grantees were then in possession of the land (*Record of said case*, page 6).

The United States took no exception to his petition for want of parties in any pleading, either before the Commissioner or before the Court.

The case therefore came under rule 53 prescribed by this Court for the courts of equity of the United States (Phil lips' Practice, p. 365).

This Court, in its decision in that case, said as follows (21 How. 170) : —

"It appears from the deeds in the record that the claimant "has conveyed nearly all his estate in the land included in "the two grants, and objection is taken to the form of the "suit. It is contended that the claim should have been pre- "ferred by the grantees of the claimant. We admit the force "of the argument in favor of the objection, and that the "dormant interest of persons not parties on the record may "frequently disturb the course of justice.

"But the contrary practice was sanctioned in Percheman's "case (7 Pet.), and has been followed since. It is compe- "tent for persons interested in the claim to employ the name "of the original claimant. (*United States* v. *Percheman*, "7 Pet. 51 ; *United States* v. *Patterson*, 15 How. 10." 7 Pet. 182.)

As Sutter was a proper party, not having disposed of all his interest in the land in question, it was simply the duty of the Court, under its own rule, to reserve in its decree the rights of Sutter's assignees. This the law provided for in the patent to be issued, and consequently all the Court said, beyond securing those rights, was mere dictum, and a

dictum that finds no support in the Percheman and Patterson cases, to which the Court refers.

It must be borne in mind that the proceedings had in relation to the Las Animas grant before the Surveyor-General, and the confirmation by Congress of a portion of the grant, are the equivalent, as to this grant, of the proceedings had in the Percheman, Patterson, and Sutter cases in relation to the grants concerning which those suits were brought; that in all these cases nothing was in issue save the claim against the United States, while in the present suit the contest is between different claimants, claiming, under the same confirmed grant, interests vested in them by the very terms of the confirming act.

In the Castro case (23 How. 438) the Court had confirmed, under said act of 1851, one square league to Castro. Subsequently in surveying it, the Surveyor-General included in his survey about four square leagues. The Commissioner of the General Land Office refused to issue a patent for the amount called for by the Surveyor-General's survey. Castro thereupon attempted to compel the issue of the patent by mandamus, and failed, as he ought to have done. Appellant fails to see how the Castro case has any possible bearing upon the present one.

Appellee states in his supplemental brief (page 3) that "the estate of Mrs. Farnsworth, Thomas Leitensdorfer's "sister and trustee, would, in any case, have been bound by "this Court's decree; for she was witness of her *cestui que* "*trust*, and hence was cognizant of the fact that he was suing "for all having an interest in his derivative claim." If this statement is the law, then every man who has a knowledge of

a pending litigation is bound by the facts found in its record.

Counsel for appellant have failed to meet with any such statement of the law in any elementary work or in the decision of any court. They fail to see any reason for it, and have always been taught to believe that a suit was only binding on the parties to it, and their privies in blood, estate, and law.

On page 4 of said brief it is stated: "Craig might have "objected specifically of the non-joinder of Mrs. Farnsworth "by plea or answer." It is sufficient that Craig in his answer set up a total want of capacity in Leitensdorfer to maintain the suit, and if Leitensdorfer totally lacked capacity, Craig was certainly under no necessity of informing him or his counsel, who, under any circumstances, might maintain a suit in relation to the lands in question.

## IV.

The next paragraph of said brief relates to the delivery of the deed to Eugene Leitensdorfer from Vigil and St. Vrain, dated March 7, 1844. The objection we made in our former brief was based on the evidence of Donaciano Vigil, found in the record on page 288.

We then supposed it was a fact that Leitensdorfer was, as stated in said affidavit, absent from New Mexico for several years, ending with 1849, until reminded of the fact that he was a prominent man in Santa Fé when General Kearney took possession of New Mexico; that General Kearney made him auditor of the territory, which position he held for several years, and must have been in constant intercourse with the affiant, Donaciano Vigil, who was, during

most of that time, the acting governor of said territory. Why this false affidavit was placed before the register and receiver finds an explanation in reports at cases in this Court. (See the case of *Leitensdorfer* v. *Webb*, 20 How. 176.) From this case it appears that Leitensdorfer made an assignment in December, 1848, of all his property. It was probably thought necessary that it should appear to the register and receiver that the delivery of the deed in question to Leitensdorfer occurred subsequent to said assignment.

V.

Appellee (supplemental brief in reply to our fifth point, page 19) states that future domain to colonists could not be made without Eugene Leitendorfer's assent. Appellee has furnished what he claims to be a copy of a translation of his deed from the original grantee, found in the record on page 287, but he says that that is not a correct copy, and that a better copy is found on page 290. Fortunately he has furnished us with copies of two similar deeds made by the same grantees about the same time, one on the same day, and found, the first on page 168 and the other on page 170 of the record, both in Spanish. There can hardly be a doubt that the Leitensdorfer deed was in the original substantially the same. The Spanish deeds contain an important proviso, worded as follows: "*Sujetamos a que no prescriba el que le* "*donamos por ser asi nuestra voluntad, espresando que debe-* "*mos dar a* las familias que se transporten halli terreno libre "para que pueblen, con sujecion a las garantias y beneficios "que por ambos se acuerden." Here is a provision that the grantees shall acquire nothing by prescription, which would be nonsense unless some right was reserved by the grantors

that might be prescribed against. The right reserved is found in the words "espresando que debemos dar a las "familias," &c. The verb "debemos" is in the first person plural, and must of necessity refer to Vigil and St. Vrain as the parties who are to give the land, and the conditions and guaranties are those to be agreed upon by both Vigil and St. Vrain. There is nothing in the Spanish copies of the deeds that can be translated *parties*. We therefore believe that a careful examination of these deeds, and of the laws and customs of the Mexicans prevailing at that time, support the allegation of our brief that Vigil and St. Vrain reserved to themselves the right of giving lands to the colonists, and that the only interest Leitensdorfer had by his deed was a one-sixth of the residuum left after the colonists were supplied with land. Indeed, at that time Vigil and St. Vrain could not make an absolute sale of any part of their grant to any one, unless he was an actual settler on the grant, in which case the sale was guaranteed under the 14th section of the Colonization act of 1824; but any other sale would come under section 12 of the instructions of 1828.

Appellee says, on said 19th page of his brief, that Thomas Leitensdorfer's derivative claim under the act of 25th February, 1869, became his separate property, but does not state how that act performed the duties of a suit in partition.

The last statement on that page is remarkable in view of the fact that the Record (pp. 200, 212) shows that Craig holds deeds to large tracts of land now patented to him from Thomas Leitensdorfer's grantors. If said grantors could possibly convey any title to Thomas Leitensdorfer, we see no reason why their deeds to Craig would not be quite as effectual, and we cannot understand why a quitclaim deed from his grantors

to Craig, or to any other person, would not convey all the title they had at the time, except on the theory to which both Leitensdorfers seem ever to have always acted, that the title was still vested in them without regard to the number of times they had conveyed the same land to others.

Appellee's counsel, on page 23 of their supplemental brief, contend that the power of attorney given to Eugene Leitensdorfer by Baird (Rec. p. 295), by its terms is made applicable to after-acquired property as well as to that owned by Baird at the time, relying on the phrase in said power which reads as follows: "All messuages, lands, . . . whereof I may "in any way be entitled or interested;" and in proof, they refer to a phrase in the Constitution of the United States, wherein the word "may" bears relation both to the present and the future. The better way would have been to have examined the words in the power itself referring to the future, and those referring to the present in connection with the future. In said power the future is expressed as follows: "Shall become due and owing;" again, "shall law-"fully do," and to express the present and the future in connection with the same matter, the following phrase is used: "which are or shall be due or owing."

But this power of attorney is best interpreted by the circumstance which called it into existence.

Eugene Leitensdorfer made a conveyance of land in question to defraud his creditors, and on the same day received from Baird this power of attorney (Rec. 286). There can be no doubt that the end had in view by Baird, in giving this power of attorney, was to enable Eugene Leitensdorfer to control the title of the land that had been vested in him that day, and no rule of interpretation known to courts can be used to make this power of attorney, conceived as it was

in fraud, serve to relieve another party from the consequence of what his own evidence shows to have been another fraud perpetrated by him seven years later.

VI.

**To the argument to show the deeds from Eugene and Thomas Leitensdorfer to Baird were nullities for want of consideration, we reply, —**

The proper construction to be given to their sworn statements that said deeds were made without consideration is that Baird paid no consideration for them. Inasmuch as the very object of the deeds, according to the same evidence, was to defraud creditors, there was a necessity that they should purport to have been made for a valuable consideration, and the presumption is that said deeds were in form sufficient to conceal the fraudulent intent of their origin, and consequently, if no actual consideration was paid by Baird, the greater was the necessity that the deed should appear to have been made for a valuable consideration.

Every deed found in the record made by these brothers is in form a deed of bargain and sale. In fact, nearly every deed, of the scores found in the record, contains in its granting clause the words "bargain and sell," thus showing that the ordinary form of deed used at that time and in that locality was the deed of bargain and sale.

The presumption is, therefore, that the deeds in question to Baird expressed a consideration on their face, and that in form they were deeds of bargain and sale.

But there can be no resulting trust arising to a grantor under a deed of bargain and sale which purports on its face to have been given for a valuable consideration, or which

purports to have conveyed the property to the use of the grantee, or which contains a clause warranting the title against the grantor, which is usually implied in every deed of bargain and sale, under the statute of Ann, which is in force in Colorado as before cited.

*Perry on Trusts*, sect. 162.
*Learned* v. *Tritch*, 6 Col. 432.
*Whiting* v. *Gould*, 2 Wis. 552.

There is nothing in the evidence tending to show that said deeds, or either of them, contained any clause creating an expressed trust in favor of the grantors, and under Colorado statutes, a trust can only be created by writing. The statute is quoted *supra*, page 8.

The deed from Eugene Leitensdorfer to Baird was not void as to the grantor, nor did any trust result to him under it, and the power of attorney given by Baird was, therefore, not coupled with an interest as claimed, and no title passed to Thomas Leitensdorfer under the deed of December 10, 1861, save by virtue of that power of attorney.

Appellee's argument, found on pages 26 and 27 of his supplemental brief, to the effect that the Leitensdorfers' deeds to Baird, being void as to creditors, were, therefore, void as to the grantors, needs no refutation before this Court or any other; at least, no equity court has ever been known to lend its aid for any purpose to the grantor of a deed deliberately made to defraud his creditors.

Craig in his answer having denied Thomas Leitensdorfer's ownership of the land described in his bill, he has attempted to confess a conveyance of the same to another, and, to avoid that conveyance by his own evidence, that the deed was without consideration.

If, under the circumstances, it were competent for him, after confessing the assignment, to avoid it by parol evidence, it would be neccessary that he should either produce the deed by which to prove it void, or that he should set forth in evidence every fact neccessary to lay the foundation for the conclusion of law that the deed was void. After confessing the existence of the deed, the burden of proof is on him, and not on Craig, and the simple statement that it was given without consideration is not sufficient to work an avoidance.

Appellee's counsel's criticism of Craig, on page 26 of their supplemental brief, for having stated in a deed that "the Las "Animas grant had been duly confirmed by the Surveyor-"General," is unfortunate for him, in view of the fact that the Surveror-General says in his decision that said grant "is "hereby confirmed" (Rec. page 259), and in view of the fact that in the instructions from the Commissioner of the General Land Office to the Surveyor-General, he was required to keep his record "in such a manner that it will show "every case confirmed, and every one rejected by [him] you," (Rec. page 244), and in view of the fact that the law required the Surveyor-General "under such instructions as may be "given by the Secretary of the Interior, . . . to make a full "report on all such claims as originated before the cession of "the territory to the United States by the treaty of Guada-"lupe Hidalgo, of 1848, denoting the various grades of title, "with his *decision* as to the *validity* or *invalidity* of each "of the same, under the laws and usages and customs of the "country before its cession to the United States"(X. U.S. Stat. at L. chap. CIII. p. 308, sec. 8.)

The parol evidence collated by appellee, on pages 27 and 28 of his supplemental brief, cannot change the effect of a

solemn deed, nor control the evidence of the fact that Baird claimed this identical land as his own, and filed that claim before the Surveyor-General, claiming it "in his own right."

VII.

**Irrespective of any right of appeal that Leitensdorfer may have from the award of the register and receiver, and irrespective of any mistake made by them in arriving at their award, and irrespective of any fraud that may have been used in the procurement of the award, we respectfully submit that a court of equity can grant no relief to Leitensdorfer, of any kind.**

He must first show to the Court, by proper averments in his bill, and evidence in support of the same, that he is in law entitled, in his own right, to a certified plat for all or a portion of the land described in his bill of complaint, and further, that the evidence presented before the register and receiver, taken in its entirety, was such as not only to warrant them in allowing his claim in whole or in part, but such that a rejection of his claim would be a fraud in law.

In other words, courts of equity, in cases of alleged mistake or fraud, give relief only to one who proves himself to have been wronged by the fraud or mistake complained of. They do not sit to adjudicate questions of abstract right.

*The Marye* v. *Parsons*, 114 U. S. Rep. 325.
*Story's Equity Jurisprudence*, sec. 203.
*Vernon* v. *Keys*, 12 East, 632.

## VIII.

On page 32 of his supplemental brief, appellee has overlooked an important part of the act of 1822, relating to Florida land.

His attempt is to show that a broader authority was given to the commissioners appointed under that law than was given to the register and receiver in the Las Animas case, and that such authority was given to the commissioners without any right of appeal being in terms reserved, and then says that Chief Justice Marshall, in deciding *United States* v. *Percheman* (7 Pet. 51), said, "It can admit of no "doubt that the decision of the commissioners was conclu- "sive in no case until confirmed by act of Congress."

That part of the law which counsel omitted is as follows: "The second section directs that all the proceedings of the "commissioners, the claims admitted, with those rejected, "and the reason of their admission and rejection, be recorded "in a well-bound book and forwarded to the Secretary of the "Treasury, to be submitted to Congress." See Chief Justice Marshall's opinion in said case, page 89.

On page 90, the Chief Justice says: "We think that the "object for which this board of commissioners was appointed "was to examine into and report to Congress such claims as "ought to be confirmed." It follows, as a necessary consequence from the law, when fully set out, and from the construction given to it by the Court, that the decision of the commissioners was conclusive in no case *until* confirmed by Congress. The law discussed by the Court in that case is similar to the law of 1854, under which the Surveyor-General of New Mexico "confirmed" the Las Animas grant, and forwarded his decision and the evidence on which it was

based to the Secretary of the Interior, to be by him submitted to Congress, which in this case resulted in the confirmation of the grant by Congress to the extent of twenty-two square leagues. The two statutes had for their object the ascertaining, by the United states, what grants were valid and what were not, and these commissioners performed, under the one act, substantially the duties which the Surveyor-General performed under the other. Their duties were in no respect similar to those of the register and receiver in question, since the latter had to determine questions, not between the United States and claimants, but between individual claimants themselves, and they had to determine these not according to Spanish-Mexican law or the treaty of Guadalupe Hidalgo or customs of the Mexican nation, but had to determine them according to statute law of the United States, and were to be governed by the law of procedure in force in the United States, and not otherwise.

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## Acts of Congress passed from time to time relative to supervision of public lands.

There shall be established in the department of the Treasury an office to be denominated the General Land Office; the chief officer of which shall be called the commissioner; . . . whose duty it shall be, under the direction of the head of the department, to superintend, execute, and perform all such acts and things touching or respecting the public lands of the United States and other lands patented or granted by the United States, which have heretofore been directed, &c. . . . or which shall hereafter, by law, be assigned to said office (Act April 25, 1812, volume 2, page 716).

That from and after the passage of this act, the executive

duties now prescribed or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land, under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States (Act July 4, 1836, 5th Statute, 107).

Sect. 11. That when two or more persons shall have settled on the same quarter section of land, the right to pre-emption shall be in him or her who made the first settlement, &c.; and all questions as to the right of pre-emption arising between different settlers shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a revision by the Secretary of the Treasury of the United States (*Act September* 4, 1841, *5th United States Statutes*, 456).

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Sect. 3. And be it further enacted, that the Secretary of the Interior shall perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury (*9th United States Statutes*, 395; *March* 3, 1849).

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Sect. 10. That the 11th section of the act of Congress approved 4th September, 1841, entitled . . . be so amended that appeals from the decisions of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final,

unless appeal therefrom be taken to the Secretary of the Interior (11*th United States Statutes*, 326; *June* 12, 1858).

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Sect. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government (*June* 22, 1874, *United States Revised Statutes, page* 77).

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Sect. 5597. The repeal of the several acts embraced in said revision shall not affect any act done or any right accruing or accrued, or any suit or proceeding had, or commenced in any civil cause before the said repeal, but all rights and liabilities under such act shall continue, and may be enforced in the same manner as if said repeal had not been made; nor shall said repeal in any manner affect the right to any office, or change the term or tenure thereof (*United States Revised Statutes, page* 1085; *June* 22, 1874).

## IX.

**We now proceed to show that the duties devolved on the register and receiver by said act of 1869, even if they can be called executive duties, were not such executive duties as are provided for in section 1 of the act of 1836 and section 453 of the Revised Statutes.**

But the act of 1836, as passed and as embodied in Rev. Stat. sect. 453, is limited to executive duties. Said section

reads as follows: "The Commissioner of the General Land "Office shall perform, under the direction of the Secretary "of the Interior, all executive duties appertaining to the "surveying and sale of the public lands of the United States, "or in any wise restricting such public lands, and also such "as relate to private claims of land, and the issuing of pat- "ents for all grants of land under the authority of the "government."

He is not only limited to executive duties, but is confined to three classes only of executive duties:

*First.* Such as appertain to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands;

*Second.* Such as relate to private claims of land; and

*Third.* Such as relate to issuing of patents for all grants of land under the authority of the government.

The duties devolved on the register and receiver by the act of 1869 did not belong to the first class as above specified, as they had nothing to do with the surveying of the lands in question,— no sales were to be made,— and finally said lands were not public lands within the meaning of the statutes.

They did not belong to the second class of said duties, inasmuch as the term "private claims of land" used in the statute is limited to claims against the United States; but in this case the United States had, by the act of 1860, relinquished all its rights to the lands in question to Vigil and St. Vrain, and consequently the derivative claimants before the register and receiver were not claiming against the United States, but against their grantees, Vigil and St. Vrain.

They did not belong to the third class of said duties, be-

cause the register and receiver were not charged by said act with any duty relating to a patent for the lands in question, or relating to the certified plat provided for by said act.

Again, suppose the duties performed by the register and receiver in the case in question did belong to some class of executive duties specified in said act of 1836 and in said section 453 of the Revised Statutes, — still we submit that they would not come under the supervision by the commissioner.

The act of 1836 is general; that of 1869, prescribing the duties in question of the register and receiver, is special.

The proper construction of the general act is that it gave supervision to the commissioner of all such executive duties as were then prescribed by law, or which might subsequently by general law be prescribed, leaving the supervision of special duties to be controlled by the special act prescribing them.

However that may be, section 453 of the Revised Statutes repeals section 1 of said act of 1836.

Said act of 1836 gave supervision to the commissioner under the direction of the President; said section 453 provided, not that the ommissioner should *supervise* those duties, but that he should *perform* them, and gave to the Secretary of the Interior the supervision of the duties to be performed by the commissioner.

The commissioner's supervision of the duties in question, therefore, ended June 22, 1874, when said section 453 became the law; and if it be claimed that his supervision in the special case was continued under section 5597 of the Revised Statutes, our response is, that such supervision then must be exercised under the direction of the President. If the commissioner's supervision remains in force, so must the

limitation and direction of that supervision remain in force.

If the act of 1836 can be construed to give an appeal to the Commissioner of the General Land Office from the award and decisions of the register and receiver, under the act of 1869, there is apparently no reason why it would not give an appeal to the Commissioner of the General Land Office from the decision of the Surveyor-General of New Mexico made under section 8 of the act of 1854 relating to Mexican land grants: but, so far as known, no interested party has ever yet claimed a right of appeal from the decisions of said Surveyor-General.

So strictly judicial are the matters left by the act of 1869 to the determination of the register and receiver, that they might with equal propriety have been left to be determined by the Circuit Court of the United States for the District of Colorado, in a suit properly instituted, in which all the derivative claimants, original grantees, their legal representatives, and the United States should be parties.

Any decree passed in such a suit, all said parties being before the Court, declaring the complainant to be "a derivative claimant" within the meaning of the act, and to be entitled thereunder to a part of said grant specified by legal subdivisions would be as good evidence of title as the certified plat provided by that act of Congress; and no other proceeding or document would be needed for vesting the fee, for the act leaves nothing to be done as to the derivative claimants but to identify the land and the party, and such a decree would identify both. In such a suit it would not be necessary to pray for any relief against the United States, and the only object in making the government a party would be to estop it and all claiming under it from questioning the decree.

Congress contemplated the possibility that the derivative claimants might be satisfied with less than twenty-two leagues, but left two floats for the remainder, one for St. Vrain and the other for the legal representatives of Vigil.

In carrying out this part of the law, various executive duties would have been required, in the location of the floats and adjusting their boundaries, in adjusting the homestead and pre-emption claims that might have been found within the locations made of said floats, in locating other tracts in lieu thereof. But Congress made no provision by said act of 1869 for the performance of any duties whatever relating to said possible floats, but left them to be performed under the general law. If the duties required of the register and receiver in relation to derivative claims were executive and of the same class as those required in relation to said possible floats, why should Congress provide specially for them in the one case, and, in the same act, leave the others to be performed under the general law?

## X.

**Appellee has persistently claimed in his bill and in his brief that the original grant to Vigil and St. Vrain was void ab initio: and on page 32 of his supplemental brief he says, it was "void for want of jurisdiction in the gov-" ernor to make a grant of 922 leagues."**

He seems to think it necessary to the maintenance of his case to establish the invalidity of the grant, so that it may appear that the acts of Congress in relation thereto were not confirmatory, but were original legislative grants of portions

of the public domain, thereby enabling the appellee to maintain that the registre and receiver, in the execution of the duties imposed upon them by the act of 1869, were acting within the scope of their ordinary duties as such officers, and were not acting as a special tribunal under a special act of Congress, which provided no appeal from the award they might make.

**If the grant were void, certainly this suit, for many reasons above shown, cannot be maintained.**

We, however, affirm the validity of the original grant for the following among other reasons: —

**The Las Animas grant is an empresario colonizing grant.**

The grantees in their petition declare that "in the coming "spring we will commence operations which will be con- "tinued until the colony shall be established."

The extent of the grant is inconsistent with the theory that it was intended other than as an empresario grant.

Being an empresario grant, it was not referred to the departmental assembly for approval.

Their jurisdiction to approve was limited to settler grants under the 5th section of the instructions of 1828. No particular form of grant was ever prescribed, and no two governors ever seem to have followed the same forms in making a grant, and we believe it to be a fact that no governor ever followed the same form in making two separate grants.

The law prescribed generally the conditions on which empresario grants were to be made, and when made, the law became as much a part of the contract of grant as if it

had been written out and signed by the governor as a part thereof.

The action of the grantee shows that they considered it after having been made a colonization grant. This is shown by their deed to Leitensdorfer, "in which reference is made "to the colony to be established," which is found in the record; also in the other two deeds of the grantees found in the record, the one to Bent and the other to Armijo (Rec. pages 290, 168, and 170).

The action of Congress in the act of confirmation, making provision for actual settlers, recognizes it as an empresario grant, in that it guarantees the contracts which the empresarios had made with their colonists, as required by the 14th section of said Mexican colonization law.

We therefore respectfully submit that the grant in question was an empresario grant; and now proceed to examine the law and the decisions applicable to such grants.

The Mexican executive instructions of 1828, issued in explanation of their colonization law of 1824, provided in relation to empresario grants, in substance, as follows: —

Section 2. The empresario shall petition the governor for the land he desires.

(Cornelio Vigil and Ceran St. Vrain made such a petition (Rec. pages 249 and 251).

Section 3. The governor shall proceed immediately to investigate the matter of the petition, or refer it to the municipal authorities to ascertain whether there be any objection to making the grant.

(The presumption is that the governor obeyed the law, and made the investigation himself. There is

no evidence that he referred it for investigation to the municipal authorities).

Section 4. Said investigation having been made, the governor shall accede or not to such petition.

(The governor certainly acceded to the petition, as shown by his granting the land).

Section 8. The grant asked for, being made, a document signed by the governor shall be given to serve as a title to the party interested, "in virtue whereof possession shall be "given."

(The document signed by the governor is found in the record, pages 249 and 252, and by virtue of this, possession was given, as shown by the record, pages 249, 250, 251, and pages 252 and 253).

Thus all the requirements above referred to were complied with according to the customs of that time and country. It will be observed that the grant proper was made on the margin of the petition, and the granting words simply directed the possession of the land to be given (See petition to alcalde, following grant, Rec. p. 254). This might not be a good grant under our law, but it must be remembered that, under the civil law, lands were transferred by simply transferring possession, and giving possession gives the land, as anciently it did in England.

There remain to be considered in connection with this grant, section 4 of said colonization act, relating tos grant within the twenty-two league boundary limit, the grant in question being largely beyond that limit.

Also section 12 of said law relating to the eleven league limit; said grant covering more than that area.

Also section 7 of said instructions, relating to the approval of the empresario grants by the Supreme Government, there being nothing in the record affirmatively showing such approval.

These three sections will be considered in their order as above:

## I.

Section 4 of the act of 1824 has been held by this Court to be limited in its application to grants that were to be settled by persons who were aliens to Mexico, and have no application whatever to settlement by Mexicans (*Arguello* v. *United States*, 18 How. page 548).

The reason for said restriction in section 4, so far as relates to this grant, absolutely ceased on the transfer of New Mexico to the United States. And there is no evidence in the record to show that prior to said transfer, any one who was an alien to Mexico, either settled or attempted to settle, on the grant. It follows, therefore, under the construction of this Court given to said section and the facts connected with the grant, that the grant can be considered precisely as if said section 4 had never existed.

## II.

Is an empresario grant limited to eleven square leagues?

Section 1 of said instructions provides for two kinds; grants to empresarios, and grants to families or private persons. Section 12 of the law reads as follows, in the original: —

"12. No se permitira que se reuna en una sola mano como-
"propiedad mas de una legua cuadrada de cinco mil varas de
"tierra de regadio, cuatro de superficie de temporal, y seis
"de superficie de abrevadero."

The literal translation of this section, as near as the idioms of the two languages will permit, is as follows: —

"It shall not be permitted to unite in one hand, as prop-
"erty, more than one league square of five thousand varas
"of irrigable land, four of surface or temporal (capable of
" cultivation without irrigation), and six of surface having
" watering places for cattle."

The important words to consider in this section are "comopropiedad," which means "as property," denoting absolute dominion, an indefeasible estate, like our term "in "fee simple;" "de temporal," which mean land that can be cultivated without irrigation. Such lands are found near the mountains where the rain is sufficient for the raising of crops; and "de abrevadero." Abrevadero signifies a watering place for cattle, and the phrase in which it is found, signifies lands supplied with watering places for cattle.

It will thus be seen that this section prescribes no absolute eleven league limit to the boundary of the lands in one place, that may be united in one person; for every one acquainted, in the slightest degree, with Mexican territory knows that in many places eleven leagues of the kinds of lands described in said section cannot be found within the boundaries of a tract that may contain a hundred square leagues of surface. Thus, in the first place, there is no such thing in the law, strictly speaking, as an eleven league limit. Second, a limitation is put on this possession by the words "comopropiedad." The actual settler under the law first receives his land, but

always with conditions subsequent, and when those conditions have been fulfilled, he holds his lands "comopropiedad," but not till then. The actual settler can receive eleven leagues of such land as described in the twelfth section, either from the government or from any empresario, but an empresario is expected to furnish lands for many families. Therefore, if he proposes to give his settlers each eleven leagues, as he may do under the law, he must have in his grant as many times eleven leagues as there are settlers under him. That is, if he has two hundred settlers under him, he needs to have two hundred times eleven leagues with which to supply them, or twenty-two hundred square leagues of land, such as is described in section 12.

No one claims that the Las Animas grant amounts even to a thousand square leagues, yet the record shows that there were over a thousand settlers on it before any attempt was made by the government to claim for itself any part of this grant by actual survey.

As the empresario could, in his individual capacity, obtain a grant of eleven square leagues for his own use, without obligating himself to settle it with others, it seems absurd to suppose that a man possessed of sense would ask for an empresario grant if limited to the same area as a private grant, and thus deprive himself, or leave himself liable to be deprived, as have Vigil and St. Vrain, of all their land by the strong arm of the government, exercised in obedience, not to law and justice, but to popular clamour, for large grants are things not unknown in our own history.

To Penn was granted Pennsylvania, and then he was permitted to buy the two Jerseys and a part of Delaware. Lord Baltimore had a small empresario grant known as Maryland. A few empresarios in Connecticut were given a tract of land

reaching westward to the South Sea, and at the time these English empresario grants were made, this region of country was no more densely populated with wild Indians than was the northern part of New Mexico at the time of the making of the Las Animas grant.

It is therefore respectfully submitted that there is no restriction found in the law as to the limits of an emprsario grant.

III.

It was the duty of the governor, and not of the empresario, to forward the espediente of the grant to the central government; and the presumption is that the governor obeyed the law, and the grant was approved by the central government, as there is nothing in the evidence to establish any disapproval. And as the possession given was legal and valid, he who disputes that must show affimatively that the central government exercised its power of disaffirming the grant. He who should attempt to maintain a denouncement of the lands in possession of the grantees would be under the necessity of affirmatively showing that the central government of Mexico had taken such action as would render the lands in question subject to denouncement. That has never been done. The United States in its dealings with Mexico disclaimed all right of property by virtue of conquest, and entered into formal negotiation for the purchase of the territory acquired, which negotiations were consumated, the money paid, and the property delivered. The United States thereby acquired two things,— the sovereignty being one, and the unappropriated lands within the territory ceded the other. Mexico could have ceded the sovereignty

without ceding the lands, for one sovereignty can own lands within the territorial limits of another. Mexico could also have ceded the sovereignty to the United States and the unappropriated lands to an individual for a consideration. But in ceding them to the United States, the latter received no other nor better title than would have been received by an individual in the case supposed. In practice, the government's title may be considered the best, simply because it has more power back of it.

The case is as follows: —

M, through an agent, grants to V a certain tract of land by metes and bounds within a specified township, most of which is owned by him; surveys the tract, marks the boundaries, puts V in possession, gives him a formal deed, but reserves the right to declare a defeasance. After V, with the knowledge of M, has been in quiet possession for five years, M quitclaims all title to said township to S, but in the deed it is specially provided that V "shall be main- "tained and protected in the free enjoyment of his liberty "and property."

Does the quitclaim deed thus binding S to protect V in his property still empower S to exercise the right of defeasance which M had reserved to himself but which he had never exercised? And especially, could this right be exercised after S had made a careful examination of the case through his own accredited agent and had been informed by the agent that the grant from M to V was valid, was made in good faith, and made in accordance with the laws and customs of the time and place.

Suppose S should bring suit to quiet his title to the entire township and should make V a defendant, and the facts as above stated should be found by the Court; could the Court

grant the relief prayed, or would it dismiss the bill with costs?

To apply the case, Mexico, through its agent, the territorial governor of New Mexico, in due form of law, granted to Vigil and St. Vrain a certain tract of land by metes and bounds, which was owned by Mexico, but situated in New Mexico, in which territory Mexico owned the most of the land. The agent, the governor, caused the land to be surveyed and its boundries marked, and placed Vigil and St. Vrain in possession, and they remained in possession five years, when Mexico saw fit to quitclaim to the United States all her title to New Mexico; but in the quitclaim deed, the treaty of Guadalupe Hidalgo inserted in the 11th article, a provision that Vigil and St. Vrain "shall be maintained "and protected in the free enjoyment of their liberty and property." But the law under which the territorial governor acted contained a proviso that the grant thus made should be subject to defeasance by Mexico. Now, does the cession to the United States with the above clause still operate to empower the United States to declare a defeasance which Mexico might have done? Is not the treaty itself, in view of the aforesaid provision for the protection of Vigil and St. Vrain, tantamount to the very approval which the seventh section of the instructions calls for?

Consideration must also be given to the fact that Mexico had five years in which to exercise the right it had reserved, a time sufficiently long to warrant the conclusion that she had either approved the grant or had determined that she would not disapprove it; also that twelve years more passed before the United States claimed any right to disapprove said grant, even in part, and that nine years more elapsed before it took any steps to define by survey any

part of the grant as its own. Another important fact must be taken into consideration, appearing in this case on page 413 of the record, that the United States obtained a decree of confiscation against some of the owners of the grant, an act totally inconsistent with the theory that the land belonged to the United States. It is therefore repectfully submitted that appellee's contention that the Las Animas grant was void in its origin, and that the act of Congress quitclaiming twenty-two leagues of the same was a new grant, is not sustained by the law and the facts.

## XI.

The statement on page 42 of appellee's supplemental brief that the case of "*Johnson* v. *Towsley*, (13 *Wall.* 72), was a "bill for the surrender of Johnson's junior United States "patent . . . that this Court granted the relief," is a heroic attempt to bend a case to fit the one at bar.

The reporter (page 76) states the case as follows: —

"Towsley, relying on his patent, and on the different acts "of Congress regulating the public lands, filed his bill in "one of the inferior courts of Nebraska, against Johnson and "others, his grantees, to compel them to surrender their *title* "to him;" a thing very different from a bill by one person against another to compel the surrender of a United States land patent. In scores of cases the courts, in suits between individuals, have laid their hands on titles claimed under patents and have decreed their conveyance according to equity.

But no case can be found where the court, in a suit between individuals, has declared a United States land patent void and ordered its cancellation.

On the same page appellee also says in substance that to cancel a United States land title it is only necessary to bring the suit in the name of the United States, "where, as in "*Mulligan* v. *The United States*, if the title is vacated, the "land will be restored to the public domain."

The word "title" in the above paragraph is doubtless used therein as equivalent to the word patent.

As to the lands in question in the Mulligan suit, this Court decided that "if the title is vacated, the lands will be restored "to the public donain;" but this in no manner supports appellee's contention that such a suit could be maintained in the name of an individual in case the United States had no interest in the land involved.

On appellee's theory that the grant to Vigil and St. Vrain was void in its origin, a cancellation of Craig's title would restore the land to the public domain,— hence the Mulligan case in no manner supports his contention.

Appellee's conclusion on same page, drawn from *Van Wyck–Knevals case*, 106 United States, 360, results from an erroneous supposition that the word "title" in this case was equivalent to the word "patent." Sometimes it is, and sametimes it is not.

A decree had been passed directing VanWyck to convey the land which had been patented to him by the United States, to Knevals, the latter deriving the title thereto through a railroad grant to a state. VanWyck appealed. This Court found all the merits of the case to be with Knevals, and affirmed the decree of the Court below, but in its opinion suggested that the relief "should properly be "limited to a decree declaring the equity of the complainant, "the invalidity of the title of the defendant, and enjoining "him from the assertion of any claim to the property under

"the patent;" but the Court did not make the decree conform to this suggestion, but left it in the form given to it in the Court below.

From appellee's argument, it is evident he considered the "declaring . . . the invalidity of the title of the defendant" to be equivalent to decreeing defendant's patent to be void, and ordering its cancellation.

If such were the case, then enjoining VanWyck "from "the assertion of any claim to the property under the patent, "would be a work of supererrogation." Dead patents no more than dead men ever call for injunctions. Evidently what the Court meant by the word "title" in said suggestion quoted, was the title which VanWyck claimed by virtue of his entry at the Beatrice Land Office of the land in question in that suit, on the thirteenth day of April, 1870, and acts subsequent thereto made by him to perfect said entry; which said title the Commissioner of the General Land Office held valid, and issued to him a patent thereon to serve him as evidence of that title. This Court said on the same page of the opinion: "The title had passed from the United "States, and consequently no right could be conferred upon "him." That is, the title to the land had passed from the United States prior to VanWyck's entry of the land in question at the Beatrice Land Office; but the United States had issued no patent to any one at that time, nor was there any thing in the act of Congress making the grant, to fix the grant to the land. That had to be done by subsequent acts; hence the need of a patent.

Appellee, however, might learn much as to the proper management of this case from the suggestion of the court which he compliments so highly. He might learn that the first step ought to have been directed towards the establish-

ment of an equitable title in himself to some particular tract of land.

Appellee, to support his contention that he can maintain this suit in his own name to cancel Craig's approved plat and patent, refers to a large number of cases, and discusses them with his usual ability on pages 27, 28, 29, 30, and 31 of his original brief.

We will examine them in nearly the same order:

*First Opinions Attorney-General*, 300.

Attorney-General Wirt says: "The holder of a location "may institute a suit in chancery for the purpose of rescind- "ing a patent which has been properly granted."

This case relates to land in the Virginia Military Reservation in Ohio, the title to which never vested in the United States, and consequently any patent given by the United States for the land within that reservation, was null and void, and could be collaterally attacked, both in equity and at law, and comes within the rule laid down in *Patterson* v. *Wynn*, 11 Wheaton, 380, referred to in our original brief, page 51.

*First Opinions Attorney-General*, 458.

In this case Mr. Wirt assumes that certain New Madrid patents had been issued to parties not entitled to them, and he says they can be repealed by a *scire facias*, or bill on the chancery side of the Court of the United States within whose jurisdiction the lands lie, which proceeding may be instituted by the United States in their own name; or the pre-emptioner may be authorized to use the name of the United States for that purpose.

*Fourth Opinions Attorney-General*, 720.

In this case the Attorney-General, in relation to the proper proceeding for cancelling a land patent, says:

"A bill may be filed in the name of the United States, or "even of a party concerned, and a suit be conducted either "by the District-Attorney or the solicitor of the pre-emp- "tioner to set aside the patent, or hold the patentee as a "trustee."

In support of his opinion, Attorney-General Legare refers to two very early Maryland decisions; *Seward's Lessees* v. *Hicks*, 1 Har. & McHenry, 24; and *Lord Proprietor* v. *Jennings*, 1 Har. & McHenry, 92, without taking into consideration that those patents were nothing but deeds made by the Lord Proprietor of land which was his individual property, granted to him by the crown.

*Fourth Opinions Attorney-General*, 558.

In this case a patent had been obtained without right, and the question submitted was "whether a second patent can be "legally issued, or what is the proper course to be pursued?"

As to the first part of the question, Mr. Attorney-General Clifford decided "that a second patent for the same land "should not issue, so long as a prior patent remains unre- "voked by the judicial tribunal." And as to the second part of the question, he says: "In my view, the Court of Chan- "cery has full jurisdiction of the case, and there Mr. Arnold "can have a remedy if he is entitled to it; if, however, he "should be advised by his counsel that it is neccessary, you "might authorize him to use the name of the United States, "as was suggested by this office in the case of William Rus- "sel, on the 26th of March, 1842."

*Shepley* v. *Cowen*, 91 U.S. 330.

In this case, a contest arose in relation to land claimed by one, under a patent from the United States, and by another, claiming the same land under a patent from the state of Missouri.

The suit was in equity, and brought by the party holding under the state patent. The Court below decreed in favor of defendant, and this Court affirmed the decree. There is nothing in the case as reported, to indicate what relief complainant had prayed for.

The record of the case, volume 9, page 4570, October term, 1875, shows that the prayer for relief was as follows: "The plaintiff prays that a decree may be rendered vesting "in him all title, real or pretended, which is held by said "defendants and each of them, and for general relief."

*Moore* v. *Robbins*, 96 U.S. 530.

In this case, Moore applied for a patent for forty acres of land. Bunn contested Moore's right to the patent before the register and receiver, who decided in Bunn's favor. Moore appealed to the commissioner, obtained a decision in his favor, and received a patent to the land in question. The matter coming into the Ilinois State Court, a decree was passed in favor of Bunn's mortgage, regardless of Moore's patent. And thereupon, Moore brought the case to this Court by writ of error, and obtained a decree reversing that of the Court below, and sustaining his patent.

*Lytle et al*, v. *Arkansas et al.*, 9 How. 314.

In this case, pre-emptioners brought suit in State Court, praying that defendants holding under United States patents

might be ordered to surrender their patents and other muniments of title to the complainants; which in effect is a prayer that the defendants hold title as trustees to complainant. The County Court dismissed the bill; the State Supreme Court affirmed the decree of the County Court, and this Court, on writ of error, reversed the decree, remanded the cause for further proceedings.

*Cunningham* v. *Ashley*, 14 How. 377.

Counsel for apppellee state that in this case, this Court declared certain United States patents void on a bill filed by the pre-emptioner, Cunningham.

This statement would tend to mislead the Court were it not for the fact that it was made concerning one of its own decisions.

Among the prayers for relief were the following, to wit,—

"And that by a decree of this Honorable Court, the said "patents may be ordered and adjudged to be delivered up to "your orator, and all the title of said defendant thereby "and thereunder obtained, to vest in your orator abso-"lutely, and to him to enure, and that in as full and "ample a manner as though said patents had originally issued "to and in the name of your orator . . . And that your ora-"tor be decreed to pay them said sum of two hundred dol-"lars, or that said patents and all deeds made thereunder "be declared to be absolutely null and void, and said defend-"ants, and all persons claiming under them, be absolutely and "forever enjoined," &c. (*Records, S.C. U.S., December Term*, 1862, *volume* 2, *page* 1713).

This prayer, though inartificially drawn, is in substance that the patentee may be decreed to hold the title under the pat-

ent in trust for the plaintiff, and in this and many similar cases this Court has granted that relief.

The Court found that Cunningham had a valid pre-emption claim to a part of the land for which the defendants, on a subsequent void entry, had obtained patents. But this Court did not nullify those patents nor vacate them, but on the contrary directed in substance the Court below to enter a decree that defendants convey by quitclaim the land to which the plaintiff had established his right, on his paying or tendering to them the minimum price of the land, with interest, &c.

The decree of the Court below, made in executing the mandate of this Court, is in substance, that the defendant's quitclaim to the plaintiff their title to that portion of the land to which the plaintiff had established his right, on his paying to them the minimum government price, interest, &c., therefor.

*Cunningham* v. *Ashley et al.*, 13 Arkansas, 674.

*Bernard's Heirs* v. *Ashley's Heirs et al.*, 18 How. 43.

Bernard claiming certain pre-emption rights in several tracts of land for which defendants had obtained United States land patents, filed a bill against them, praying for alternate relief, the cancellation of the patents, or that defendants be decreed to convey their title under said patents to him. (*Record S.C. U.S., December Term*, 1855, *volume* 1, *page* 89).

Ashley filed a cross bill to be quieted in his title to one of said tracts of land against a junior patent for the same obtained by Barnard.

The Court below dismissed complainant's bill and granted

the relief prayed for in the cross bill, and on appeal this Court confirmed that decree.

*Newhall* v. *Sanger*, 92 U.S. 761.

Sanger held under a senior patent to land from railroad company. Newhall held under a junior United States patent title to same land. Sanger asked cancellation of the junior patent. The Court below granted the prayer of his bill. This Court reversed the decree and ordered the bill dismissed.

*Vance* v. *Burbank*, 101 U.S. 514.

Vance brings a suit to have land patent declared inlavid as against him, and for a conveyance to him of such title as the defendant held under the patent. The bill was demurred to, demurrer sustained by the Court below, and the decree of said Court was affirmed by this Court on appeal.

*United States* v. *Stone*, 2 Wall. 536.
*United States* v. *Minor*, 114 U.S. 233.
*United States* v. *Hughes*, 11 How. 552.
*Hughes* v. *United States*, 4 Wall. 232.

In these four cases the United States brought suit in its own name to cancel its own patents. Appellee relies on them to support his contention, because, in deciding them, the Court has not declared that they could not have been maintained in the name of an individual; that is, the finger on a sign may be disregarded, unless the legend underneath says that by travelling in the opposite direction the traveller will not reach the point to which the finger directs him.

*United States* v. *Throckmorton*, 98 U.S. 61.

This suit was brought by the United States District At-

torney, without authority from the Attorney-General, in his own name, on behalf of the United States, to have declared null and void a decision of the California Land Commissioners affirming a Mexican land grant and a decree of the United States Circuit Court confirming said decision.

This Court holding that the suit was instituted without authority, and for other reasons, dismisssed the bill, saying:

"We are of opinion, that unless by virtue of an act of Con-"gress, no one but the Attorney-General, or some one au-"thorized to use his name, can bring a suit to set aside a "patent issued by the United States, or a judgment rendered "in its courts on which such a patent is founded. . . . The "reason of this is obvious; namely, that in so important a "matter as impeaching the grants of the government under "its seal, its highest law officer is to be consulted, and should "give the support of his name and authority to the suit."

We fail to find anything in this case that in the remotest degree can support appellee's contention.

*Field* v. *Seabury*, 19 How. 323.

Appellee does not claim any support from this case, but only tries to show that it does not weigh against him by calling the language of the Court a "*dictum*." Said "*dictum*" is as follows:

"In England a bill in equity lies to set aside Letters Patent "obtained from the king by fraud. . . . And it would in "the United States; but it is a question exclusively between "the sovereignty making the grant and the grantee. But in "neither could a patent be collaterally avoided at law for "fraud. This Court has never declared it could be done."

*Silver* v. *Ladd*, 7 Wall. 219.

In this case the prayer was for cancellation of patent and for general relief. The decree was expressly stated to be made, under the prayer for general relief, that the defendant convey title to the plaintiff.

*Carrol* v. *Safford*, 3 How. 441.

Carrol, holding a United States land patent for certain lands in Michigan, brought suit in equity to set aside an alleged illegal tax assessment and tax sale, and to enjoin the county treasurer from conveying the lands to the purchasers under the tax sale. It came to this Court on a certificate from the judges of the court below, and this Court said: "We entertain no doubt that in a proper case, relief "may be given in a court of equity."

*Steele* v. *Smelting Company*, 106 U.S. 447.

Counsel for appellee, in commenting on the opinion in this case, have so manipulated a quotation from the opinion by prefixing to it a phrase of their own, as to make it appear that the Court has declared "that to vacate a United States "land patent, the remedy of the aggrieved party must be "sought by him in a court of equity, if he possesses such an "equitable right to the premises as would give him the title "if the patent were out of way." Counsel make this statement, blending their own language with that of the Court, in face of the fact that in the very paragraph from which the quotation is taken (page 454), this Court used the following language: "It (referring to the patent) "cannot be vacated "or limited in proceedings where it comes collaterally in "question. It cannot be vacated or limited by the officers

"themselves" (referring to the officers through whom United States land patents are granted). "Their power over the "land is ended when the patent is issued and placed on the "records of the department. This can be accomplished only "by regular judicial proceedings taken in the name of the "government for that special purpose."

Respectfully submitted,

O. D. BARRETT,
BENJ. F. BUTLER,
*of Counsel.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1886.

WM. CRAIG, *Appellant*,

*vs.*

THOMAS LEITENSDORFER, *Appellee*, J. ALLEN AND LEE ANN S. KING, *Administratrix, Intervenors.*

## Appendix to Brief for Appellant.

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## Appendix to Brief for Appellant.

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JUDGE LOVES' DECISION IN THE CASE OF LEITENSDORFER *v.* WILLIAM M. CAMPBELL AND WILLIAM CRAIG.

I am ready to decide the case of Thomas Leitensdorfer against William M. Campbell and William Craig.

This case, after many vicissitudes, is now before the court on its final hearing. The bill, as it now stands, is for the purpose of setting aside of certain approved plats, and also the patent that issued in pursuance of the plats to William Craig; and the ground upon which the bill rests at present is that the registrar and receiver of the land office, in the grant and award from which these plats issued, were induced by fraud, and in fact by bribery, to grant the award. Now, that is the question to be decided, whether these officers were induced by fraudulent practices on the part of Craig, the present defendant, to make the award on which the patent issued, and in order to understand that question it will be necessary to refer briefly to the course of this litigation as well as to the act of Congress confirming the grant. It arises under a Mexican grant to Vigil and St. Vrain.

This grant was for, I think, about 440 square leagues and embraced property and land to the amount of over four millions of acres. It was before the war, and after the war, in pursuance with a treaty with Mexico, Congress took the matter up, confirming the grant as originally made, as to 22 leagues of the land, and the act of 1860, confirming the grant provided that as to 22 leagues of it, it should be confirmed. The act provides that the exterior lines—Cornelio Vig*h*il and Ceran St. Vrain claims of eleven leagues each, subject to the claims derived from said parties is confirmed by the act of Congress. Now this act of 1869 makes some further provisions in relation to it—the act of 1860 confirms the grant with others—provided that "Claim No. nine in the name of John Scully and others shall not be confirmed for more than five square leagues, and the claim No. 17, in the name of Vig*h*il and St. Vrain shall not be confirmed for more than eleven square leagues each, it will be necessary to pay attention to the claims of eleven square leagues to each of said claimants, and it then went on in the survey of the claims of Vig*h*il and St. Vrain. The locations shall be made as follows: Survey shall be made first, of all the tracts actually occupied by settlers or those depending on the promises which have heretofore been given by Vig*h*il and St. Vrain on the tracts claimed by them and to be deducted from the tract embraced in the twenty-two square leagues, the remainder shall be located in two equal tracts, from each of the square tracts or any part of the tract claimed by Vig*h*il and St. Vrain selected by them."

Now it is not necessary to be exactly accurate as to what I have to say with reference to the course of litigation that grew out of this matter, because it is unnecessary. This matter is, at all events, under the act. There is a provision in this act, undoubtedly, that creates the register and receiver a sort of special tribunal to determine all the claims under this grant. There is no doubt about that at all, and the claims were brought before the register and receiver. Now, Craig, it appears very clearly from the testimony before the court here, that Craig never represented in any way whatever the title that he, Vig*h*il, derived all the claim he had from St. Vrain; and it may be assumed for the purposes of this decision that William Craig was entitled to whatever St. Vrain had in said claim, outside of what the settlers had under these parties; whatever St. Vrain may have been en-

titled to, William Craig would probably own. At all events, we will assume that for the purposes of this decision.

Now, these officers, the register and receiver of Pueblo, I believe they were, made an award in which they gave all the land, every acre of it, after satisfying the claims of the settlers, to Craig. In the first place, the twenty-two leagues would amount to something less than 100,000 acres, some 90,000 and odd acres, as the testimony would show. The register and receiver understood that it took some 22,000 acres to satisfy the claims of the settlers under Vig*h*il and St. Vrain; they took that 22,000 from that whole area and then gave to Craig what remained, viz: some 73,000 acres. An appeal was taken to the land department at Washington, and when they reached there—which is a matter not very material now—it was referred to Attorney-General Pierrepont, and he gave an opinion that the appeal would not lie at all, and that the decision of these officers, the register and receiver, was final and absolute upon this claim. It seems to me it is not a bad thing to send such a gentleman as that to the Court of St. James, where he might air himself. Really it seems extraordinary. I understand Mr. Justice Miller looked at it, and said there could be no doubt whatever that this appeal was well taken, and it was a manifest error in the opinion given by the Attorney-General.

Now, it would seem most extraordinary if it was ever the intention of the Congress of the United States that two officers, the receiver of public moneys and the register, should pass final judgment—a tribunal partly quasi-judicial should pass final judgment on the rights of a man on property worth millions, as this is said to be by the bill, it covering an important town somewhere in Southern Colorado, and it appears to be exceedingly valuable, and that the Attorney-General should find any grounds upon which he should say there could be no appeal to any other tribunal in such a case, and that the hearing of that should be absolutely final as to the rights of the parties. At all events, he did so advise President Grant, and the President ordered plats, and on the plats, which were the evidence of title upon which President Hayes afterwards caused a patent to issue, at least there seems to be a copy of the plat in the papers.

Now, in that state of things, I should say here that the complainant in this suit *deserves* title under a conveyance from both these parties, both Vig*h*il and St. Vrain, long

before Craig's title accrued, until it seems that these parties own in the conveyances of undivided interests on this ground, amounting to four-sixths, they retaining two-sixths themselves. There was one-sixth interest conveyed, I believe, to *John* Leitensdorfer and Thomas Leitensdorfer, and the present claimant derives title under him. I shall say something about his title after a while; for the present I will merely state that he derived title under conveyance from both of these parties—from both of these original Mexican grantees—and which antedates any right which Craig sets up here; but I do not think it is very material in my decision whether it antedates it or not. Now, then, Thomas Leitensdorfer brings this bill in equity—but I should say, in the first place, that this certified plat, which was evidence of title, was transmitted to Mr. Campbell, the surveyor-general, to be delivered to the present defendants. It was in his hands to be delivered to the present defendants. And this bill, as originally filed, was to obtain an injunction restraining him from the delivery of that patent, on the ground that it was obtained by fraud and bribery of these officers. It recited upon that ground that these officers were induced by fraud and bribery at the instance at least of Craig, to make this award, and the bill prayed injunction against the delivery of that patent. Judge Hallett granted a preliminary injunction, but it was subsequently overruled and that bill dismissed with leave, I believe, to file a supplemental bill by Mr. Justice Miller, upon the ground that it was not competent by injunction to prevent the executive officers of the government from performing their duty. It is not material now whether that is correct or not, but it is my own opinion very decidedly that an injunction was properly granted for this reason. I know it is not competent for any court of equity to interfere with the executive officers of the government in doing their duty which is a matter of discretion, which the law imposes upon them as a matter of judgment and discretion, but whenever the duty to be performed involves no discretion, no exercise of judgment, no inquiry into the facts whatever, then it seems to me that it is a proper case for injunction. For instance, what had the surveyor-general here to do but to deliver that patent? It was in his hands for delivery only; the whole matter had been decided and determined; everything that the executive officers of the gov-

ernment had to do was done; all matters of discretion had been then exercised by them, and it was then in the hands of Mr. Campbell simply for delivery, and this bill was filed to impeach it upon the ground of fraud and to restrain him from delivering this patent.

Now, it is a well conceded doctrine by Justice Miller and others that the very moment that was delivered to the defendant Craig, a bill in equity might be filed to set it aside and annul it upon the ground of fraud. That has always been conceded, that when a patent is once executed and delivered it may then be impeached on the ground of fraud, and it may also be impeached on the ground that the officer issuing it has mistaken the law to the injury of the ights of some one who has superior rights or title, but so ong as the executive officers are in the exercise of their public duties they cannot be restrained. Now, it seems to me that it is a strange thing that when the executive officers of the government had done everything that they were required to do, and except the mere delivery of the deed, and when that instrument was in the hands of Mr. Campbell for the purpose of being simply turned over to the defendants, it seems to me strange that the mischief at this stage could not have been prevented by the court not allowing the mischief not to be done, and prevented this bill coming in to impeach it; but it is not very material now. At all events that injunction was dissolved with leave to file a supplemental bill, and that supplemental bill was filed seeking to impeach, now the title which Craig obtained, on the ground that he secured it by fraud from these officers. That was alleged in the bill, and specific acts of bribery and fraud were set out in the bill. That matter come before Judge Dillon, and Judge Dillon sustained the demurrer as to Campbell, and overruled it as to the other parties, as to Craig, and held that if it could be shown that Craig obtained this award from the register and receiver by fraudulent practices, by bribery, that the plaintiff was entitled to relief under the bill. That, thereupon, the demurrer being, I suppose, abandoned, the defendant filed an answer in which he specifically denies the alleged acts of fraud and bribery; testimony has been taken, and the case is now before the Court upon that answer and upon the testimony for final hearing, and the question is whether this fraud has been sustained or not; but before I go to that, I wish to call

attention, however, I should say, Judge Dillon, in rendering his decision, seems to believe that he is standing on uncertain ground, says so, and, at least, has some doubt about it, and says the whole matter will not be considered as conclusively settled, whether this can be maintained on the ground of the fraudulent practices of Craig, but the whole matter may come up for discussion again at the final argument, so that counsel have entered at large into the question as if the demurrer had never been acted upon.

"We contend that the Court cannot, either directly or indirectly, set aside an award or finding of a special tribunal created in the department at Washington, for the purpose of affecting the treaty and the register and receiver at Pueblo, when they made an award of the land to Craig, constituting such a tribunal; that the Court cannot set aside in anyway the acts of the heads of the department at Washington, or the President, and this bill seeks to do both; that there is no appeal from the findings and awards of this special tribunal." That is the line of discussion. Now, is that a sound position?

Is it a sound position that because the Act of Congress makes these officers a special tribunal to determine this matter that the result of their judgment cannot be impeached on the ground of fraud? Surely the Land Department of the United States is a special tribunal for passing upon questions growing out of applications for patents for public lands. The law puts upon them the deciding of the questions preliminary to the issuance of a patent, and these officers are to decide these questions upon the facts and make their award. Nobody questions this. It is too well settled a question that after a patent has been issued it may be impeached on the ground of fraud, and, surely, on the ground of bribery; although it is a tribunal that cannot be interfered with in the first instance, but after a patent is issued, it is competent to show that they were induced by fraud on the part of anyone to issue the patent, and more especially, I should say, by bribery, if that could be made to appear. Now, surely, this special tribunal is not a tribunal of any higher authority than a court of justice. Certainly it is not. It is a *quasi-judicial* body. At most it hears and determines in a very irregular and informal way matters brought before it. It has no plenary judicial power, to say the least of it, but here is a court of justice with full plen-

ary judicial power; it enters judgments, and suppose a judgment is procured through fraud and it be impeached by a bill in equity, on the ground of having been obtained by fraud. Can it be said, truly that a tribunal like this, to hear and determine this matter, is of a higher character than a regular judicial tribunal, and its decisions are of so high a kind that they cannot be impeached at all, on the ground of fraud, by a direct proceeding in equity? It seems to me perfectly clear that the decision of Judge Dillon was right on the demurrer, holding, of course, that this bill could be *settled* to impeach this patent on the ground of fraud of these officers. Now, that brings us to the question of whether there was such fraud alleged in the bill. Now, it appears by the testimony of Mr. Moffat, that Craig conveyed a very large quantity of land, very large number of acres, to a man by the name of Golding, a saloon keeper, a man without means, insolvent, a man without much repute, without any visible means to pay for so valuable a property. It seems from his testimony, also, that Golding conveyed this property over to Moffat for the benefit of Mr. Cook, the receiver, I believe, of public moneys. Golding conveyed all that he seems to have received from Craig—it was quite a large quantity of land—to this man, Moffat, an officer of some bank in the city, I think, president or cashier. At all events Moffat testifies that he received that he received that conveyance in trust for Cook; that Cook was indebted to the bank, and that he was to hold it as security against the amount that Cook owed the bank, and in the second place he testified further that Cook is dead, that he is his executor, and that he now holds it for the estate of Cook, which brings us to the end of this transaction. In the first place if there was no intention on the part of Cook, and he wanted a conveyance from Craig, he would have taken it directly; he would not have had it made to a saloon keeper. This very crookedness is a strong indication of fraud; he would not had it conveyed to a man that had the appearance of being his tool, and he conveyed it over for Cook's benefit. The very indirectness of the thing, the very crookedness, is a clear manifestation of fraudulent intent on the part of Cook himself. Again, allowing that he had no positive fraudulent intent, still I hold such a thing would be improper, because he was an officer of the government and had no right to accept any of

this ground, no right to receive any of it, and he had no right to take any interest in that grant, and I think that the law would hold that to be fraud *per se*, of the intention on the part of Cook to do a fraud upon the other parties in interest; but what confirms me is the question as to this fraud is the very decision which these officers made, It was so flagrantly unjust, so manifestly against law, that it is difficult to suppose they were rational men, that would have made such a decision as that without a sinister and fraudulent purpose.

Now, this defendant here, Craig, had no claim whatever to the interest of Vig*h*il. What right had he to the interest of Vig*h*il in this property? He does not pretend to have any title from him, either direct or indirect; he derived no title from him; there were other parties that derived title from both of these grantees, Vig*h*il and St. Vrain, which were entirely set aside.

Now, it would appear that the grant was for twenty-two leagues, which amounted to some ninety odd thousand acres, and the act of Congress directed these officers, in the first place, to satisfy the demands of the settlers for their interest, and in their report they showed it required, to satisfy the demands and rights of these settlers, about 23,000 acres; they would take 23,000 acres from the whole amount of 90,000 acres and then they awarded to Craig all the rest of the land amounting to 73,000 acres of land, all there remained of the estate of Vig*h*il and St. Vrain, although Craig had no title from Vig*h*il whatever.

Mr. SYMES. Allow me to suggest one thing. Your Honor has not had before you the opinion of the register and receiver, nor any of the evidence upon the Craig claim, and in the evidence introduced in support of the Craig claim on this grant, I have seen it, and did not bring it here, because I did not suppose you would go into their findings only on the question of fraud; that it was conclusively proved, as stated, that St. Vrain had the whole title to it, that he had it for twenty years, and I suppose if that was before your Honor, you might have a different opinion.

COURT. It would make no difference in my mind in view of this act of Congress. Now, what right had they to depart from the express terms of this act of Congress in making any such decision as that in setting aside the claims of Vig*h*il altogether? It says, this act of Congress provides, in

the first place that "claim No. 17 in the name of Cornelio Vig*h*il and Ceran St. Vrain shall not be confirmed for more than eleven square leagues each, which confirmed to these parties for eleven square leagues each of this grant, and then, again, in surveying the claim of John Scolly, which had been lawful for him to locate five square leagues in a square body in any part of the body, and the five square leagues were surveyed in the claim of Vig*h*il and St Vrain, the location shall be made as follows, viz: A survey shall be made and shall except the tracts occupied by actual settlers that had settled, or rights under promises to settle, which have heretofore been given by Vig*h*il and St. Vrain in the tracts claimed by them, and to deduct such amounts from such tracts, and the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by said Vig*h*il and St. Vrain, selected by them, and it shall be the duty of the surveyor-general of New Mexico to immediately make surveys."

Now, then, it provided here that this property should be set off in two separate tracts, aggregating twenty-two leagues; that 23,000 acres should be awarded to those parties, that it should be set apart in two separate tracts, keeping the property of each one separate.

Now that same vein seems to be carried out in the subsequent act of Congress of 1869. "The exterior lines of the Cornelio Vig*h*il and Ceran St. Vrain claims of eleven leagues each, subject to claims derived from them, as confirmed by the acts of Congress, and the claims of all actual settlers on the tracks of Vig*h*il and St. Vrain, held under the title and promises of title which have been made by Vig*h*il and St. Vrain, or their immediate representatives, prior to the passage of this act, who shall establish their claims to the land to the satisfaction of the Register and Receiver of the local Land Office, and each one, in like manner, which amounts shall be deducted from the *quantum* confirmed and included in the adjusted limits of the claim of said Vig*h*il and St. Vrain, respectively."

Now, I am unable to see how the officers could proceed in the way they did, and certify that Craig was entitled to the whole of this land, and entirely ignoring claims and titles that had accrued before he had any interest in it. I cannot see how Craig, representing only one of these interests, should come in and take the whole of this property. I

cannot conceive upon what ground it could be done. No notice whatever is taken of Vighil's interest here; none whatever, nor of anybody claiming under him, nor any derivative of title which is entirely set aside by this decision. In a case for injuries done to a person, suppose he should obtain a judgment by fraud, and suppose he should go into a court of equity with a bill to have the judgment set aside on the ground of fraud, what would be the relief given? In that case all the court could do, it seems to me, would be to set aside the judgment, remove the judgment out of the way, as an obstacle in the way. A court of equity would be entirely incompetent, from the nature of its organization, to give relief in that case, because the parties would be entitled to a trial by jury A court of equity might remove the obstruction, set aside a fraudulent judgment, and leave the parties to their remedies at law by a jury trial. If it was a proper matter for a court of equity to take cognizance of, it could annul the judgment and grant the relief, and then the court at law would proceed as though the obstacle had never been interposed, and not leave the parties uncertain as to where they are or without remedy. Now, I am inclined to think that is the measure of the rule that must be granted here; in fact, no other rule, under this bill, could be granted, except to set aside this fraudulent award, plat, and patent, that was issued in pursuance of it. That is all that is prayed for in the bill.

Mr. SYMES. Oh, no.

COURT. There is a great deal of question here about the position of this complainant; the truth is that he has no legal title now, as it appears his title had been conveyed to Judge Hallum; I believe he testifies, however, that he holds it in trust in part—I think one undivided half, so that he is here without a legal title before the court; he is the holder of the mere equitable title. Now, of course, if there was to be a complete determination of this controversy of this bill of equity, it would be necessary to have all the parties in interest before the court, and all parties in interest are not before the court—not over half of them—and it would be impossible to go on and determine the whole matter. That is to say as to the other claimants, because the proper parties are not here, and it is not shown what they are entitled to, and we should have to bring them into court in order to do that. But the question

with me is whether the parties here are sufficient to make this order setting aside the patent to Craig. The other parties would have the right to go before the proper tribunal, that is, before the register and receiver, and show their claims in this grant. It seems to me they might bring a bill in equity to set aside the obstructions that stand in its way. Here is a patent issued from the Government of the United States. Mr. Craig has that patent; he has the legal title to that property, and it is impossible now to proceed anywhere to obtain justice until that obstruction is removed. It is exactly parallel, I think, to a case of a judgment in a strict common law case which stands as an obstruction in the way.

Now, I think if he has an equitable interest in the grant, as it appears here from the *locations* and the proof that a court of equity could remove this obstruction out of the way, because he could go before these officers and assert his rights, he could go before them and claim the benefit of his interest in the grant. It is not as satisfactory as it might be by reason of the fact that even his trustee is not here; he is the mere beneficiary.

Now, we know the legal title, according to his own showing, is in Mr. Hallum, but, at all events, I think he has a sufficient interest to justify the court in making a decree to remove this obstruction, and that decides nothing as to the controversy between these parties. They have to go over again before the land officers and try it *de novo*.

I am not certain but what a bill in equity might be filed holding Craig to be a trustee for all these parties, to settle the whole controversy, completely determining the rights of every claimant in that land under that grant, and then compelling Craig to make a conveyance, as trustee, as their respective rights are shown.

The decree of the court is that the award of the register and receiver, that the plat and certificate, and that the patent, to Craig, be set aside, and declared null and void because of fraud.

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DENVER, COL., *October 8th*, 1886.

I hereby certify that I have, with Frank Dorian, carefully compared the above copy of the opinion of Judge Love

in the case of *Leitensdorfer* v. *Craig*, with the printed copy of said opinion, found in the Denver Daily News, of July 3d, 1880, page 4, and find the same to be a correct copy of said printed copy of said opinion.

O. D. BARRETT,
FRANK DORIAN.

123-189

Office Supreme Court U. S.
FILED.
OCT. 12 1887
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1886.

WILLIAM CRAIG'S EXECUTOR, *Appellant*,
*vs.*
THOMAS LEITENSDORFER'S ADM'R, *Appellee*. } No. 2.

MOTION TO REVERSE DECREE, AND REMAND CAUSE TO CIRCUIT COURT WITH DIRECTION TO DISMISS THE BILL OF COMPLAINT FOR WANT OF JURISDICTION IN CIRCUIT COURT

**Brief in Support of said Motion.**

BENJ. F. BUTLER,
O. D. BARRETT,
*Of Counsel for Appellant.*

R. O. Polkinhorn, Printer.

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OCTOBER TERM, 1886.

WILLIAM CRAIG'S EXECUTOR, *Appellant*,

*vs.*

THOMAS LEITENSDORFER'S ADM'R, *Appellee*.

No. 2.

Now comes the appellant, by his counsel, and moves the court that the decree of the Circuit Court, from which this appeal was taken, be reversed, and the cause be remanded to said Circuit Court with direction to dismiss the bill:

And for cause says that said Circuit Court had no jurisdiction of this suit:

Because neither at the commencement of this suit, nor at any subsequent time, did the appellee, Thomas Leitensdorfer, have any interest in the lands involved in this suit, amounting in value to five hundred dollars, or to any other sum.

And in proof, thereof, the following evidence is offered:

*First.* Extract from his deposition, from record, page 312 and 313, hereto annexed and marked "Exhibit A."

*Second.* His deed, referred to in said deposition, a certified copy of which is hereto annexed, and marked "Exhibit B."

*Third.* A statement of the lands claimed by Thomas Leitensdorfer in this suit, on behalf of himself and others not named, taken from his amended bill of complaint (R., p. 37), and hereto annexed and marked "Exhibit C."

*Fourth.* Three affidavits showing that the ten acres excepted in said deed, Exhibit B, are not worth five hundred dollars, and are not a part of the lands claimed by said Leitensdorfer in this suit, but are situated in Section 14, Township 32 S. Range 63, W., in Las Animas County, Colorado; of which affidavits one is by Edward J. Hubbard, administrator of Thomas Leitensdorfer, and now appellee in this cause, the same being hereto annexed and marked "Exhibit D;" another is the affidavit of Michael Beshoar, which is hereto annexed and marked "Exhibit E;" and a third is the affidavit of Albert W. Archibald, which is hereto annexed and marked "Exhibit F."

*Fifth.* Counsel will refer to the deed, a copy of which is found in the record, page 294; to the power of attorney, a copy of which is found on page 295 of the record; to deed, a copy of which is found on page 292 of the record; to the deed of Thomas Leitensdorfer to John Hallum by E. Leitensdorfer, agent, and the confirmatory deed of Thomas Leitensdorfer to J. Hallum, copies of which are found in the "evidence in behalf of appellant in support of motion for rule to show cause," on pages 66 and 69 respectively, and will also refer to pages 11 and 15 of said evidence, and also to the deposition of John Hallum, found in the record, page 84.

BENJ. F. BUTLER,
O. D. BARRETT,
*Of Counsel for Appellant.*

## Exhibit A.

EXTRACT FROM DEPOSITION OF THOMAS LEITENSDORFER, RECORD, P. 312.

Int. 17. What conveyance did you make to Spruce M. Baird in the year 1867?

A. 17. I made him a deed of one-sixth part of the Las Animas grant. I made a reservation of ten acres. There was no consideration; was made for a matter of convenience.

Int. 18. Explain all the circumstances attending and surrounding the execution of that conveyance.

A. 18. I was involved a little. I owed a little and I was afraid people would sell me out.

Int. 19. Did Spruce M. Baird, at any time between the year 1867 and the time of his death, which occurred in the year 1872, ever re-convey that one-sixth interest to you?

A. 19. Yes, sir; Eugene Leitensdorfer, his agent, did.

Int. 20. How long was Eugene Leitensdorfer in the territory of Colorado in the year 1872; at what time did he come, and at what time did he leave?

A. 20. He came in February or March and, I think, left about the first part of June.

Int. 21. So that from the year 1867 until the first day of June, 1872, you had no interest whatever in the said one-sixth interest in the Las Animas grant?

A. 21. I was the owner of it all the time and had possession of it.

Int. 22. Do you know of Spruce M. Baird in the year 1870 presenting and filing with the surveyor general of Colorado his right or claim to one-sixth interest in the Las Animas grant?

A. 22. No, sir.

Int. 23. At that time that you made a deed of your one-sixth interest of the Las Animas grant to S. M. Baird, did you at the same time make a deed or include that of what is known as the Leitensdorfer ranch?

A. 23. I made a deed of one-sixth part of the Las Animas grant to him, but it was only a matter of convenience. I received no valuable consideration. In that deed I reserved 10 acres.

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## Exhibit B.

QUIT-CLAIM DEED. LEITENSDORFER TO BAIRD.

THE TERRITORY OF COLORADO, }
*Animas County.* }

Know all men by these presents that I, Thomas Leitensdorfer, of the Territory and County aforesaid, for deed in consideration of one dollar, good and lawful money to me in hand paid by S. M. Baird, of the Territory and County aforesaid, the receipt whereof is hereby acknowledged, and for other good and valuable considerations thereunto moving, have this day bargained, sold, released, transferred, and conveyed and these presents do bargain, sell, alien, release, transfer and convey unto the said S. M. Baird, all the right, title and interest I have in and to a certain tract of land situated in said Territory and in the counties of Huerfano and Animas; the interest hereby conveyed being the one-sixth part of a certain tract of land heretofore granted by the Governor (Manuel Armijo), of New Mexico, to Cornelio Vigil and Ceran St. Vrain, and situated and bounded as follows, to wit:

Beginning at a monument placed on the north line of the grant of Miranda and Beaubien, known as the Rayado Grant, one league east of the Purgatoire River, thence running on a straight line northerly to a monument placed on the south bank of the Arkansas River, one league below the confluence of the Purgatoire River with said Arkansas River; thence following up the south bank of said river, Arkansas River, to a point or monument one and a half leagues

below the confluence of the Rio San Carlos with the same, thence on a straight line south to a point or monument two leagues west of the Rio Huerfano; thence in a straight line up the said mountain to a monument placed at the the source of the said Huerfano, thence following up the ridge or crest of said monument the north line of said Miranda and Beaubien, and thence eastwardly along said line to the place of beginning; said tract of land being bounded on the north by the Arkansas River, on the south by lands of Miranda and Beaubien, and other owners of the Rayado grant, and on the east and west by the Public Domain, and embracing within the limits the Rivers Purgatoire or Las Animas, Apishipa, Huerfano and their branches, all tributaries of the Arkansas River.

The interest hereby sold and conveyed being the one-sixth part of said tract of land, and the same heretofore sold and conveyed by the said Cornelio Vigil and Ceran St. Vrain to Eugene Leitensdorfer, and after by him to the said S. M. Baird, and afterwards by his agent, the said Eugene Leitensdorfer, to me.

Reserving, however, to myself a homestead and residence consisting of ten acres, embracing the mound on which I have erected a house, said ten acres to be located to suit my convenience and wishes.

And I do hereby sell and convey for a like consideration to the said S. M. Baird, together with said interest in and to said grant or tract of land, my farm and all improvements where I now live, with all my farming tools and implements, and wheat and corn sufficient to work the farm for one year, and also my oxen and milch cows, and other cattle upon said farm, as per inventory to be rendered by me.

To have and to hold, *to have and to hold* the aforesaid one-sixth interest in the aforesaid grant or tract of land, (except the reservation aforesaid), with all its appurtenances to him, the said S. M. Baird, and his heirs forever.

And I hereby covenant and bind myself forever to warrant and defend the title to the aforesaid grant

or tract of land for the said Baird and his heirs against myself, my heirs and all other persons claiming title thereto under or from me, but against the claim or claims of no other person, this being a quit-claim deed.

In testimony of all which I have hereunto set my hand and affixed my scroll as a seal this 14th day of Sept. A. D. 1867.

THOMAS LEITENSDORFER, [SEAL.]

Delivered in the presence of:—
Witness:—
WILLIAM A. BRANSFORD.

TERRITORY OF COLORADO, }
Las Animas county. }

Personally appeared before me Thomas Leitensdorfer, well known to me to be the identical person who executed the foregoing instrument of writing and acknowledged that he signed, sealed and delivered the same for the use and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and sealthis the day and year first above mentioned.

GEO. S. SIMPSON,
*County Clerk.*

I hereby certify that the foregoing instrument was duly recorded, and that the record is a true copy of said instrument of writing, this 16th day of September, A. D. 1867.

GEO. S. SIMPSON,
*Recorder.*

STATE OF COLORADO, }
*County of Las Animas.* } *ss.*

I hereby certify that the above and foregoing is a true and correct copy of the original instrument of writing, as it appears in the records of my office, in volume 1, pages 66, 67 and 68.

In witness whereof, I hereby set my hand and official seal this 6th day of November, A. D. 1886.

JESUS MA. GARCIA,
*Recorder.*

[COUNTY SEAL.]

BY EUGENIO GARCIA,
*Deputy.*

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## Exhibit C.

Extract from Bill of Complaint, showing lands claimed by Thomas Leitensdorfer in this suit.

"The west half of section 13, all of sections 22, 23, 24, and 27, the east halves of sections 28 and 32, and all of section 33, in township 32 south, of range 63 west, of the 6th principal meridian; sections 5, 7, 8, 18, 19, 20, 21, 22, and 23, the west half of section 25, all of sections 26, 27, 34, and 35, and the west half of section 36, in township 33, south, of range 63 west; the west half of section 1, and all of sections 2 and 3, in township 34 south, of range 63 west; and sections 13 and 24, in township 33 south of range 64 west." (R. p. 37).

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## "Exhibit D."

SUPREME COURT OF THE UNITED STATES.

[October Term, 1886.]

WILLIAM CRAIG, *Appellant*,
vs.
THOMAS LEITENSDORFER, *Appellee*.

STATE OF COLORADO,
*County of Las Animas.* } *ss.*

I, Edward J. Hubbard, make oath that I have carefully examined a copy of a deed, duly certified by the Recorder of said County to be a true copy of

a deed recorded in said County in Volume 1, pages 66, 67, and 68 of the Land Records of said County, wherein Thomas Leitensdorfer was the grantor and S. M. Baird the grantee, and in which conveyance the following paragraph appears:

> "Reserving, however, to myself a homestead and residence consisting of ten acres, embracing the mound on which I have erected a house, said ten acres to be located to suit my convenience and wishes."

I further make oath that I know the lands claimed by Thomas Leitensdorfer, and know the mound to which reference is made in said reservation or exception, and have known it for more than ten years last past. I further make oath that I am acquainted with the value of real estate in that vicinity, and have been acquainted with its value for more than ten years last past. I further make oath that said ten acres, with the improvements then on it, were not worth, on the 4th day of May, 1877, the sum of two hundred dollars, and that the same are not worth, at the present time, the sum of two hundred dollars, nor have they been worth two hundred dollars at any time between the 4th day of May, 1877, and the present time. The house referred to in the said exception was what is known as a Mexican "Jacal," constructed of slabs set up endwise, with a roof of poles and dirt, with a fireplace of mud or adobe, and was not more than sixteen feet in length, nor more than twelve feet in width, and was one story high, and would not be considered worth, when new, more than fifty dollars, and it had fallen into decay before the 4th day of May, 1877.

EDWARD J. HUBBARD.

Subscribed and sworn to before me, this 23d day of February, 1887.

[NOTARIAL SEAL.] R. L. WOOTON, JR.,
*Notary Public.*

## Exhibit E.

SUPREME COURT OF THE UNITED STATES.

October Term, 1886.

---

WILLIAM CRAIG, *Appellant*,
*vs.*
THOMAS LEITENSDORFER, *Appellee.*

---

STATE OF COLORADO,
*County of Las Animas.* } *ss.*

I, Michael Beshoar, make oath that I have carefully examined a copy of a deed recorded in said County in Volume 1, pages 66, 67, and 68, of the Land Records of said County, wherein Thomas Leitensdorfer was the grantor and S. M. Baird the grantee, and in which conveyance the following paragraph appears:

> "Reserving, however, to myself a homestead and residence consisting of ten acres, embracing the mound on which I have erected a house, said ten acres to be located to suit my convenience and wishes."

I further make oath that I know the lands claimed by Thomas Leitensdorfer, and know the mound to which reference is made in said reservation or exception, and have known it for more than ten years last past. I further make oath that I am acquainted with the value of real estate in that vicinity, and have been acquainted with its value for more than ten years last past. I further make oath that said ten acres, with the improvements then on it, were not worth, on the 4th day of May, 1877, the sum of two hundrd dollars, and that the same are not worth at the present time the sum of two hundred dollars, nor have they been worth two hundred dollars at any

time since the 4th day of May, 1877. The house referred to in the said exception was what is known as a Mexican "Jacal," constructed of slabs set up endwise, with a roof of poles and dirt, with a fireplace of mud or adobe, and was not more than sixteen feet in length, nor more than twelve feet wide and was one story high, and would not be considered, when new, worth more than fifty dollars, and it had fallen into decay before the 4th day of May, 1877. Said ten acres in Section 14, Township 32 South, and Range 63 West.

MICHAEL BESHOAR.

Subscribed and sworn to before me, this 24th day of February, 1887.

[NOTARIAL SEAL.]

J. W. SHRYOCK,
*Notary Public.*

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## Exhibit F.

SUPREME COURT OF THE UNITED STATES.

[October Term, 1886.]

---

WILLIAM CRAIG, *Appellant*,
*vs.*
THOMAS LEITENSDORFER, *Appellee.*

---

STATE OF COLORADO, }
*County of Las Animas.* } ss.

I, Albert W. Archibald, make oath that I have carefully examined a copy of a deed duly certified by the recorder of said county to be a true copy of a deed recorded in said county, in volume 1, pages 66, 67, and 68, of the Land Records of said county; wherein Thomas Leitensdorfer is the grantor, and S. M. Baird is the grantee, and in which conveyance the following paragraph appears:

"Reserving, however, to myself a homestead and residence consisting of ten acres, embracing the mound on which I have erected a house, said ten acres to be located to suit my convenience and wishes."

I further make oath that I know the lands claimed by Thomas Leitensdorfer, and know the mound to which reference is made in said reservation or exception, and have known it for more than ten years last past. I further make oath that I am acquainted with the value of real estate in that vicinity, and have been acquainted with its value for more than ten years last past. I further make oath that said ten acres, with the improvements then on it, were not worth, on the 4th day of May, 1877, the sum of two hundred dollars, and that the same are not worth, at the present time, the sum of two hundred dollars, nor have they been worth two hundred dollars at any time between the 4th day of May, 1877, and the present time. The house referred to in said exception was what is known as a Mexican "Jacal," not more than sixteen feet long, nor more than twelve feet wide, one story high, and was covered with poles and dirt for a roof, and would not be considered worth, in this vicinity when new, more than fifty dollars, and had fallen into decay, or was entirely demolished before the 4th day of May, 1877. Said ten acres reserved was in Section fourteen, Township 32, South, and Range 63, West.

ALBERT W. ARCHIBALD.

Subscribed and sworn to before me, this 23 day of February, 1887.

[NOTARIAL SEAL.]

E. BRIGHAM,
*Notary Public.*

**Brief in support of said Motion to Reverse, Remand, &c.**

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Counsel for appellant deny that anything can be found in the bill of complaint to support the jurisdiction of the Circuit Court.

The bill of complaint describes a sixteen thousand acre tract of land, including the site of Trinidad, Colorado, and alleges that the same is worth more than twenty thousand dollars; but complainant makes claim to only a part of this tract of land, without any specification as to what part of it or what interest in it; nor does he any where aver that the value of his part, of the same, amounts to five hundred dollars, or to any other sum; nor is there anything in the evidence to establish the value of his interest in it.

The bill of complaint also describes a tract of land, situate about fifty miles distant from the former, to which complainant disclaims all interest, and simply alleges that the appellant has acquired title to the same.

Complainant also sets up a right to an appeal to the Commissioner of the General Land Office from the award of the register and receiver made in relation to said lands, and complains that he has been deprived of that right of appeal by the wrong doing of the defendant, appellant. And appellant's counsel understand that counsel for appellee brought this suit in equity to recover this right of appeal. They

are led to this conclusion from numerous allegations of the bill, and from appellee's brief, and from evidence before the Court, as follows:

"Said derivative claim of complainant * * * does not conflict on the ground with the derivative claim of William Craig." (Bill of Complaint, R. 37.)

"And your orator shows that, however defective may be the derivative claims of claimant and other appellants before the Commissioner, they all have a legal right to an examination and decision of their claims upon their merits by the Commissioner, and in case he decides against them by the Secretary." (*Ib.*, R., p. 44.)

Complainant prays for cancellation of Craig's title to land in which he admits he has no interest, (R. 49.

The part of the prayer asking "That Craig be adjudged as holding the same in trust for plaintiff was, by amendment, *ex industria,* stricken out," (R. 113.)

"Neither party pretends title to any land within the derivative claim of the other. * * * Our bill is not to try title. The court can't pass on that question till the Commissioner and Secretary act." (Bradford's letter to Hallum, Evidence on rule to show cause, p. 11.)

"Complainant does not seek to get any land by the decree, but only seeks to get a decree corralling Craig's plat." (Ib. p. 11.)

"The best answer to the objection of the want of interest in the complainant is, that the court has no jurisdiction of the merits of complainant's claim." (Ib., p. 15.)

Thus it appears that this suit has been brought solely as a proceeding, ancillary to the Commissioner's alleged jurisdiction, and not for the purpose of establishing any right of property in complainant.

If the right of appeal were a concrete thing, it would seem that the remedy would be an action in trover, but not being concrete, it would seem that if any action could possibly be maintained, it would be one in the nature of an action in trespass on the case, in which damages might be awarded to the extent that Leitensdorfer should aver and prove himself to have been damnified. But it is respectfully submitted, if the right of appeal be, in fact, the matter in contention in this case, that it is a matter whose value is absolutely incapable of estimation in money, and that consequently the suit cannot be maintained upon that theory, as abstract rights as such only, cannot be litigated before a circuit court of the United States.

This court said in the case of *Barry* vs. *Mercein*, 5th Howard, p. 120, "The matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained."

The mere fact that we have deprived the plaintiff of a right which he derives under a law of Congress, does not give jurisdiction to the Circuit Court any more than would an unlawful detainer of a tract of land give jurisdiction in ejectment to a Circuit Court on the ground that the disseize purchased the land from the United States.

It is respectfully submitted that the value of the land described as Craig's derivative claim cannot support the jurisdiction in this case, because the complainant is not interested in it, and disclaims in his bill of complaint all interest therein.

It necessarily follows that the jurisdiction can be maintained, if at all, on the interest in the sixteen thousand acre tract described in the bill.

Leitensdorfer not having specified any particular interest in that tract as belonging to himself, it becomes necessary to examine carefully the allegations of the bill and the evidence produced to determine if possible what that interest is, if it has any existence.

Leitensdorfer claims title to a certain tract of land, a portion of which he admits has been sold to others. He says that Craig's title stands in his way of obtaining title to said lands; he does not want Craig's lands; he does not want Craig's title. It is impossible, therefore, that the value of Craig's lands or the value of Craig's title, as contradistinguished from his land, whatever said value may be, can lay the foundation on which to support the jurisdiction of the Circuit Court. If the suit were for damages against Craig for the wrong alleged, it would then be necessary for Leitensdorfer to establish his claim to a specific portion of lands and to prove the value of it; but the value of lands held in common with him, and the amount of damage done to his co-tenants, could not form part of the five hundred dollars value, which must be shown to give jurisdiction to the Court. We, therefore, respectfully submit that the subject-matter of this suit, on which the jurisdiction of the Circuit Court is to be based, if based at all, is the specific land which Leitensdorfer, by apt words and proper averments, set forth in his bill of complaint to be his, and averred or proven to be worth five hundred dollars.

But, as there is no averment in the bill of complaint, to indicate what specific share he claims of the lands described in it, reference must be had to the evidence in connection with his bill to determine the extent of his ownership.

The bill of complaint alleges "that on the 7th March, 1844, at Taos, said Vigil and Ceran St. Vrain executed a donation of an *undivided* one-sixth of said inchoate grant to Eugene Leitensdorfer under whom Thomas Leitensdorfer, the complainant herein, now holds." (Record 33.)

Eugene Leitensdorfer, in his deposition, (R. 286,) states that his "interest in and to the grant remained intact as it did in 1844, until the 4th day of January, 1858, when deponent conveyed to one *Spruce* M. Baird, (now deceased), one-sixth interest claimed by this deponent, said deed having been executed on the 24th day of February, 1860." No other transfer is shown to have been made until after the confirmatory act of June 21st, 1860, in which no provision whatever was made for any derivative claimants, save those who were "actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain."

There is no pretense that Eugene Leitensdorfer was ever an actual settler on the grant, nor is there any evidence that Spruce M. Baird was an actual settler on the grant at the time of the passage of said confirmatory act, or at any other time prior thereto.

The confirmatory act makes no provision whatever for settlers whose settlements may have been made subsequent to its date.

It follows, therefore, that Thomas Leitensdorfer cannot claim anything as an actual settler, under the act of June 21st, 1860.

Between the date of the confirmatory act of 1860, above referred to, and the amendatory act of Feb-

ruary 25th, 1869, two transfers of this undivided one-sixth interest were made. The first was from Baird to Thomas Leitensdorfer, "as derived by said Eugene Leitensdorfer from said original grantees" by deed dated December 10th, 1861, (Record 37 and 292), and the second was a re-transfer of the same by said Thomas Leitensdorfer to Baird, with a reservation of ten acres (R. 310, and exhibit B attached to motion to dismiss).

As Thomas Leitensdorfer had but an undivided sixth to convey to Baird, his reservation or exception as to ten acres left in him only an undivided sixth of said ten acres.

No other transfers are shown to have been made prior to the passage of the act of February 25th, above referred to, which, like that of 1860, makes no provision whatever for any derivative claimants save those whe were "actual settlers upon the tracts heretofore claimed by said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives prior to the passage of this act."

There is no evidence in the record nor allegation in the bill that S. M. Baird was an actual settler on the lands in question at the time of the passage of the last mentioned act, or that he had been such at any time prior thereto. It, therefore, follows that Thomas Leitensdorfer could not receive any benefit under the act of 1869, as an actual settler, except in respect to his undivided sixth of ten acres, and any settlement subsequently made on the lands by him, could not be brought within the provisions of this last named act, any more than could the settlement

made by him in 1862, be brought within the provisions of the act of 1860.

In 1869 or '70, said Baird filed his claim for said land before the Surveyor-General, under the provisions of said act of February 25th, 1869, that in filing the same, he uses the following language: "One-sixth (1-6) in my own right, &c." See record, page 378, and certificate of Surveyor-General found on page 379, which bears date April 20th, 1870.

Thus, as late as 1870, Thomas Leitensdorfer's interest in the grant was limited to his one undivided one-sixth of the ten acres he excepted out of his conveyance of 1867, to Baird.

When the time for acquiring by settlement any further rights of property in the Las Animas Grant ended, Thomas' right, as we have seen, was limited to an undivided one-sixth of ten acres, and there is nothing in the record to show that he ever acquired right or title to any larger share or part of the grant, unless it was done under deed, a copy of which is found in the record, page 294.

There is no possible doubt that *Spruce* M. Baird was the man to whom Thomas conveyed in 1867. In Thomas Leitensdorfer's deposition, record 312, relating to said conveyance, the name, Spruce M. Baird as the grantee, is used in the questions and answers 18 times.

The deed above referred to purports to have been made by Eugene Leitensdorfer as attorney, but it is ineffectual to convey the title out of *Spruce* M. Baird.

*First.* Because the only authority shown to Eugene Leitensdorfer to make any deed as attorney for

any one is found on page 295 of the record, it being a power of attorney bearing date February 24, 1860, and consequently made long before Baird acquired the specific title in 1867, which Eugene Leitensdorfer by this deed attempted to re-convey to Thomas. There is no clause in it making it applicable to after-acquired property, but is limited by its terms to such property as the maker of the power had at its date. Appellee claims that because the word "may" is used in the power, that it is broad enough to include after-acquired property, but he refers us to no authority applicable to powers, which must always be construed in strictness against the person acting or claiming under them. If it had been intended to make this power applicable to after-acquired property, a very few words would have been sufficient for that purpose; but they are not found in it, and the term "may have," under the general rules of construction as to powers, must be limited to what the maker had, or may have had, at the time of the making of the power. *Wright* vs. *Ellison*, 1 Wal., 16.

*Second.* This power of attorney is the same one under which this same Eugene Leitensdorfer claims to have conveyed this same interest in this same grant to the same Thomas Leitensdorfer in 1861. Consequently, it became *functus officio* on the execution of the deed of December 10, 1861.

*Third.* It is ineffectual to convey said title, because in the granting part of the deed, Eugene Leitensdorfer claims to be acting as the agent of *L.* M. Baird, and not as the agent of Spruce M. Baird, in whom was the title of the land, and there is nothing in the

signature to the deed "S. M. Baird," to show that the intention was to act for "Spruce M. Baird." and there is nothing in the certificate of acknowledgment to determine the question or throw any light upon it, inasmuch as the acknowledgment of the deed is made by Eugene Leitensdorfer as his own deed, and not as the deed of *L.* M. Baird, *S.* M. Baird or Spruce M. Baird.

*Fourth.* This deed is ineffectual to convey said title, because the same was vested in Spruce M. Baird, and the power of attorney purports to have been made not by Spruce M. Baird, but by *Spence* M. Baird. This is the name used in the first line of the power, "know all men by these presents that I, Spence M. Baird," &c. It is signed "S. M. Baird," but as the signature is insufficient to show whether it was made by Spruce M. Baird, the name *Spence* in the first line must control.

The power is not acknowledged, and the original is not produced, the paper put in evidence purporting to be a copy—thus no aid can be had from an examination of the hand-writing of the signature.

We, therefore, respectfully submit that all title in and to the land in question, that was in Thomas Leitensdorfer, in 1867, is shown to have passed from him to Spruce M. Baird in that year, and that there is nothing to show that the same ever afterwards revested in Thomas Leitensdorfer.

There is no allegation in the bill of complaint, or evidence in the record, tending to prove that Spruce M. Baird or his heirs and assigns ever ratified the conveyance attempted to be made by the last mentioned deed, or that they or any of them ever re-

ceived any consideration or benefit therefrom. The record shows that this deed was made on the 20th day of May, 1872; that it was recorded on the first day of June, and that Spruce M. Baird died on the 5th day of June of the same year.

It is, therefore, respectfully submitted that Thomas Leitensdorfer took nothing by said conveyance, and that his interest as appears from the record, at the time of the death of said Baird, was limited to his undivided one-sixth interest in the ten acres which he had excepted in his deed to Baird of 1867.

There is nothing in the bill of complaint alleging, or in the evidence proving or tending to prove, that Thomas Leitensdorfer ever acquired any interest of any kind in the grant subsequent to June, 1872.

Counsel refer to the affidavits of Edward J. Hubbard, Michael Beshoar, and Albert W. Archibald, annexed to the motion as Exhibits "D, E, & F," respectively, to prove that the ten acres excepted in the deed to Baird of 1867, have not been at any time during the past ten years worth five hundred dollars; and further to prove that they form no part of the lands described in this bill of complaint, observing that Edward J. Hubbard, who makes the affidavit marked Exhibit D, is the administrator of Thomas Leitensdorfer, and the present appellee in this cause.

It is therefore respectfully submitted that the motion to reverse, &c., should be allowed.

BENJ. F. BUTLER,
O. D. BARRETT,
*Of Counsel for Appellant.*

03-189



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

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WILLIAM CRAIG, *Appellant*,
*vs.*
THOMAS LEITENSDORFER, *Appellee.*
In Equity. No. 48.

And now comes the appellant here, by his counsel, Benjamin F. Butler and O. D. Barrett, and gives the Court to be informed that in reply to the motion to show cause filed herein on the 20th of October last, R. H. Bradford, Esq., and Charles W. Hornor representing Thomas Leitensdorfer and Thomas J. Allen, come here into Court, and set up the title to the *locus de quo*, set forth in the bill of complaint, to be in other and different persons than said Leitensdorfer, to wit: in Thomas J. Allen and Leean King, and that John Hallum is not and never has been counsel in this cause, as he, in his affidavit avers, filed in support of said motion. And the appellant says, before said motion can be determined, evidence needs to be taken and conveyances shown to establish all the facts as respects the title to said *locus de quo* at the date of filing said motion.

WHEREFORE, the appellant prays that a Special Master be appointed by this Court to take testimony on the state of said title and the rights of the parties, and report the state of said title to this Court with his findings of fact thereon.

BENJ. F. BUTLER,
O. D. BARRETT,
*Of Counsel.*

123-189

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# In the United States Supreme Court.

OCTOBER TERM, 1885.

WILLIAM CRAIG,
*Appellant,*
—*vs.*—
THOMAS LEITENSDORFER,
*Appellee.*
No. 48.

BRIEF FOR APPELLANT ON MOTION TO SHOW CAUSE.

BENJ. F. BUTLER,
O. D. BARRETT,
*Of Counsel.*

RAMSEY, MILLETT & HUDSON, PRS., KANSAS CITY

# In the United States Supreme Court.

OCTOBER TERM, 1885.

WILLIAM CRAIG,
*Appellant,*
—*vs.*—
THOMAS LEITENSDORFER,
*Appellee.*
No. 4[illegible]

## BRIEF FOR APPELLANT.

This cause comes before the Court on a motion for a rule on the appellee, and others, to show cause why the terms of the stipulation filed herein at the last term should not be carried out.

The respondents have answered, as to a rule to show cause, denying the authority of John Hallum to enter into the stipulation in question, and denying the allegations on which said stipulation was based.

We are here, therefore, to show:

*First.* That said Hallum had authority to enter into said stipulation.

*Second.* To establish the truth of the allegations on which said stipulation was based; and

*Third.* To satisfy the Court that under the peculiar state of the case, the disposition proposed to be made of it, by said stipulation, was the right, just, and proper thing to do.

To an understanding of the merits of this motion, it becomes necessary to make a

STATEMENT OF THE PRINCIPAL POINTS OF THE CASE.

Early in the year 1844, Cornelio Vigil and Ceran St. Vrain received from the Governor of New Mexico a colonization grant for about four million acres, lying between the Beaubien-Miranda grant and the Arkansas River, and embracing the lands on and between the Las Animas and the Huerfano Rivers, tributaries of the Arkansas River.

Eugene Leitensdorfer claimed an undivided one-sixth of said grant through a gift from Vigil and St. Vrain, evidenced by a conveyance in Spanish, under date of March 4, 1844, of which conveyance he produces what he claims to be a copy of a translation of the same, which said copy, verified by his affidavit, is set forth in full in Exhibit 14, pp. 32, 33 of the evidence.

In 1859 said Eugene Leitensdorfer conveyed by deed, set out in Exhibit 24, all his interest in said grant to Spruce M. Baird.

On the 22nd day of May, 1872, said Spruce M. Baird, by his attorney, Eugene Leitensdorfer, conveyed all his interest in said grant to his brother, Thomas Leitensdorfer, by deed, an abstract of which is found in exhibit 26.

In July, 1873, by deed made by Eugene, as attorney for Thomas, and confirmed by Thomas, all the interest in said grant then remaining in the Leitensdorfers was conveyed to John Hallum. Said deed and said confirmatory deed are set out in Exhibits 29 and 30.

This conveyance was made prior to the commencement of this suit.

Defendant Craig having denied in his answer that Thomas Leitensdorfer had any interest in the grant, parole evidence was given tending to prove a secret resulting trust in Thomas Leitensdorfer to the extent of seven-sixteenths of the entire interest conveyed as aforesaid to said Hallum.

On the eighteenth day of December, 1880, and after the passing of the final decree from which this appeal was taken, said Thomas Leitensdorfer by deed, set out in Exhibit 31, conveyed all his interest in said grant to Josephine Farnsworth.

In the answer to our motion is set out an affidavit of said Thomas Leitensdorfer wherein he swears he has had no interest in said grant since December 18, 1880, the date of his said deed to Josephine Farnsworth.

After the aforesaid conveyance to S. M. Baird, and prior to his said conveyance to Thomas Leitensdorfer, said Baird conveyed away, and otherwise disposed of to settlers, several miles of the Huerfano valley, with rights of pasture, water, and timber on the otherwise unoccupied parts of the grant; three miles of which valley were thus conveyed to defendant Craig and others.

See Exhibits 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

After said conveyance to Thomas Leitensdorfer, and prior to said conveyance to Hallum, said Thomas Leitensdorfer conveyed to the United States about 5,160 acres of the 16,250 to which he claimed title before the register and receiver, as shown in Exhibit 28.

And after said conveyance to Hallum, about 1,000 acres more of said lands claimed before the register and receiver were conveyed to the United States, as shown in Exhibit 33, and one-eighth of the entire interest conveyed to Hallum was, before the commencement of this suit, conveyed to Josephine Farnsworth in her own right, and

the seven-sixteenths claimed by Thomas Leitensdorfer, as a resulting trust, was by said Hallum conveyed, before the commencement of this suit, to said Farnsworth, to hold for said Thomas Leitensdorfer just as it had been held for him by Hallum. And Hallum also conveyed all his interest in one section and in two half-sections of said 16,250 acres to said Farnsworth. V. Exhibit 34.

Hallum, and assignees of his whom we represent, still retains seven-sixteenths of the interest conveyed to him in the entire grant, except as to about 2,500 acres.

We take no account of the Leeann King purchase, for she, instead of levying on the undivided interest of her judgment debtors in the 4,000,000 acres of the grant, as she might have done, levied on about 6,000 acres in which they had an interest, just as they had in the remaining millions of the grant, but none of which they owned in severalty, and none of which, possibly, in case the Leitensdorfer claims shall finally be established, will fall within the lands that may be set off in satisfaction of said claim.

Thus, at the commencement of this suit, what remained of the undivided sixth interest in the Las Animas grant, donated to Eugene Leitensdorfer by Vigil and St. Vrain—after deducting what had been conveyed by metes and bounds in severalty to Craig, to the United States, and to others—was held as follows:

Mrs. Farnsworth held in her own right, as tenant in common, one-eighth.

Mrs. Farnsworth held seven-sixteenths of it, as a secret resulting trust, for Thomas Leitensdorfer.

John Hallum held in his own right seven-sixteenths as tenant in common.

And since December 18, 1880, the complainant has held no interest of any kind in the grant.

Thus stands the title on the part of the appellee

## CRAIG'S TITLE.

The appellant Craig mortgaged all the lands allotted to him to General Butler, as shown by General Butler's affidavit (Evi. p. 2). He next mortgaged the same to Olinus Smith, as shown in Exhibit 35, and followed this by the conveyance in fee-simple to General Butler referred to in said affidavit and set out in Exhibit 36.

This conveyance was made April 20, 1877, was acknowledged May 7, 1877, and was recorded ten days later.

The original bill of complaint was filed on the 4th day of May, 1877, but no process was issued to bring the defendant Craig before the Court until the 10th of May, and no service was made on him nor appearance entered by him until long after.

At the time the suit was commenced *as to Craig*, he had no interest in its subject-matter.

Thus when this suit was commenced the complainant alone had an interest in its subject-matter, and that interest was limited to a resulting trust under the conveyance, absolute in form to Hallum; and third parties now come before the Court and seriously ask to have this Court adjudicate this cause on its merits, after it is shown to the Court that neither appellant nor appellee has any interest in the suit of any kind whatever.

## OBJECT OF THE SUIT.

The suit was brought to obtain the cancelation of a certified plat given by the United States to the defendant Craig, for about 73,000 acres, situated on the Huerfano River, and forming a part of the Las Animas grant. (See complainant's prayers, Exhibit 37.) So much of the prayer as asked that Craig be adjudged to hold as trustee, etc., was formally abandoned by the complainant. (See Exhibit 36.)

## ORIGIN OF THE SUIT.

The suit grew out of the following facts:

Vigil and St. Vrain having received the Las Animas colonization grant, embracing more than 4,000,000 acres, disposed of undivided interests in the same to Eugene Leitensdorfer and others, and of large portions of it by metes and bounds to Craig and others in severalty as settlers.

Congress, in confirming the grant by the act of June 21, 1860, limited it to twenty-two square leagues—about 98,000 acres—and made certain provisions for three classes of claimants by an amendatory act of February 25, 1869, of which the following is a copy:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the exterior lines of the Cornelio Vigil and Cram St. Vrain, of eleven leagues each, subject to claims derived from said parties as confirmed by the act of Congress approved 21st of June, 1860 (U. S. Stat., v. 12, p. 71), shall be adjusted according to the lines of the public surveys, as nearly as practicable with the lines of said claims, yet in as compact a form as possible; and the claims of the actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives, prior to the passage of this act, who may establish their claims within one year from the passage of this act to the satisfaction of the register and receiver of the proper land district, shall in like manner be adjusted according to the subdivisional lines of the survey, so as to include the lands so settled upon or purchased, and the areas of the same shall be deducted and excluded from the adjusted limits of the claims of said Vigil and St. Vrain respectively, and the claims of all other actual settlers falling within the limits of the

located claims of Vigil and St. Vrain shall be adjusted to the extent which shall embrace their several settlements, upon their several claims being established, either as pre-emption or homesteads, according to law and for the aggregate of the areas of the latter class of claims, the said Vigil and St. Vrain, or their legal representatives, shall be entitled to locate a like quantity of public lands, not mineral, according to the lines of the public surveys, not to exceed one hundred and sixty acres in one section.

"Section 2 relates to surveys.

"SECTION 3. *And be it further enacted*, That upon the adjustment of the Vigil and St. Vrain claims, according to the provisions of this act, it shall be the duty of the Surveyor-General of the district to furnish proper approved plats to said claimants, or their legal representatives, and so in like manner to said derivative claimants, which shall be evidence of title, the same to be done according to such instructions as may be given by the Commissioner of the General Land-Office.

"SEC. 4. *And be it further enacted*, That immediately upon running the lines, as provided in Section 2 of this act, the Surveyor-General of said district shall notify the said Vigil and St. Vrain, or their agents or legal representatives, of the fact of such survey being made, and such claimants shall, within three months after notice of said survey, select and locate their claims in accordance with such survey and the provisions of this act and of the act to which this is amendatory, so far as the same is not changed by this act, and shall within said time furnish the Surveyor-General with the description of such location, specifying the lines of the same.

"And the party failing to make such selection and location in such manner and within such time shall be deemed and held to have abandoned their claim, and their rights and equities under this act and the act to which his is amendatory shall cease and terminate.

"SEC. 5. *And be it further enacted*, That in case of the neglect or refusal of the said Vigil and St. Vrain, or either

of them, to accept of the provisions of this act and the act to which it is amendatory, and to locate their said claims as provided therein, no suit shall be brought or proceedings instituted in any of the courts of the United States by such party, or by any one claiming through or under them, to establish or enforce said claims, or for any cause of action founded upon the same, after six months from the passage of this act."

Approved February 25, 1869.

15 Sts. at Large 275.

This act provides: *First*, for the derivative claimants —that is, for those colonists whom the promoters of the colony had put on their colonization grant; *second*, for the promoters of the colony; and *third*, for third parties, who, without authority from the promoters of the colony, had settled on those tracts which might be set apart for the promoters of the colony after all claims of the colonists proper had been satisfied.

Now, Thomas Leitensdorfer presented himself before the register and receiver, claiming, as a colonist, one-sixth in severalty of the 22 square leagues confirmed, basing his claims on the donation deed from Vigil and St. Vrain to Eugene Leitensdorfer of an undivided sixth of the grant, and selected one-sixth of 22 leagues along the Las Animas River in and about Trinidad, making about 16,250 acres.

Craig claimed, as a colonist, under conveyances by metes and bounds from the original grantees, their heirs and assigns, a large tract in the valley of the Huerfano River.

The register and receiver decided against the Leitensdorfer claim: first, because claiming under a donation grant of an undivided sixth of the grant, he could not claim any part of it in severalty; second, because he had offered no legal evidence of the alleged donation grant to him of an undivided sixth of the grant, he offering what he

claimed to be a copy of a translation of said donation deed, supported by his own affidavit, which tells where the original is, and alleges no attempt at its procurement. See Exhibit 14.

The register and receiver allowed Craig's claim to the extent of about 73,000 acres, thereupon Leitensdorfer appealed to the Commissioner of the Land-Office from said decision rejecting his claim, and also from said decision allowing in part the claim of Craig.

The Commissioner of the Land-Office claimed that he had appellate jurisdiction of the decisions in question. Craig claimed that the act above quoted made the register and receiver a special tribunal to adjudicate the claims of all parties to said grant under said act, and that to which it was amendatory; and that inasmuch as Congress had provided no appeal, their decisions were, therefore, final.

The matter was brought to the Attorney-General, and he, in an elaborate opinion, sustained Craig's view of the case; thereupon President Grant issued the order set out on page 2, and then followed the delivery of the approved plat to Craig for the amount of lands awarded him, as aforesaid; the final selection and adjustment of lines being made by the Surveyor-General.

This suit seems to have been brought on the theory that the Attorney-General misstated the law, that the order of President Grant was *ultra vires*, that the certified plat was issued without authority, and that said plat being canceled by decree of court, the Commissioner of the General Land-Office would be at liberty to hear and determine the appeals taken from the decisions of the register and receiver.

Having shown the interests of the parties in the suit, its object and origin, we maintain—

I.

***First.*** That Hallum had the sole authority to institute this suit, and that he has had, from its commencement

to the present time, the sole authority to control its prosecution.

In proof of this we refer to a covenant in the conveyance to him (Exhibit 29), which reads as follows:

"And that the said party of the second part, and his heirs and assigns, are authorized and fully empowered to prosecute this claim in the name of said party of the first part, or to substitute himself or themselves in lieu of said party of the first part, at their own or his own option."

At the time said covenant was entered into, the claim was being prosecuted before the register and receiver in the name of Thomas Leitensdorfer. It was, therefore, Hallum's right to have himself substituted in the place of Thomas Leitensdorfer as claimant before said officers. This power to so prosecute the claim in his own name, at his option, was coupled with an interest, and was therefore irrevocable. No act, subsequent assignment or conveyance made by the grantor of that power could possibly annul it.

Has Hallum done any act to forfeit his right under that power?

He conveyed, before the commencement of this suit, to Mrs. Farnsworth, at the request of Thomas Leitensdorfer, the seven-sixteenths which he had held for his grantor, to be held by her for that same grantor as he, Hallum had held it. By that conveyance certainly Hallum forfeited no right to exercise the power conferred on him.

He also, before the commencement of this suit, conveyed to said Farnsworth, to her own use, one-eighth of the interest conveyed to him; but there is no evidence nor intimation that she ever filed any petition or took any other step in the court below to be made a party to the suit. As she by non-action waived her right to be made a party in the court below, both as to the interest she claimed to hold in her own right, and also as to the interest she claimed to hold in trust for her brother, neither she nor any assignees under her, as to those interests, can claim any recognition before this Court.

Hallum himself was no party to the suit. He might have made himself a party, but waiving that right in the court below, neither he nor any assignee of his can come to this Court and claim to be represented here by virtue of any interest held by him when the suit was commenced.

We know of no rule or practice by which an equity suit, while pending before an appellate court can be directly or indirectly so amended as to make it embrace interests which were not represented before the court below.

Now, the only interest, on the part of the complainant in this suit, represented in the court below was that claimed by Thomas Leitensdorfer as a resulting trust under the conveyance to Hallum, the extent of which was seven-sixteenths of what remained of the undivided sixth donated by Vigil and St. Vrain to Eugene Leitensdorfer.

That is the only interest that can possibly be represented before this Court.

Now, under the covenant contained in the Leitensdorfer-Hallum deed, said Leitensdorfer and his assignees are estopped to deny Hallum's right to control the suit, even to dismissing the same, provided that in so doing he exercises his professional discretion in good faith.

But what has become of that interest?

We have seen above that it passed by deed to Mrs. Farnsworth, subsequent to the passing of the final decree appealed from, to-wit, on the 18th day of December, 1880, and that it so passed Thomas Leitensdorfer swears in the affidavit which these respondents have filed in their answer to our motion.

But Mrs. Farnsworth took that interest with full knowledge of Hallum's right to control the suit, and neither she nor any assignee of hers can be heard to deny it.

But what became of the interest thus conveyed to Mrs. Farnsworth on said 18th day of December, 1880?

Did it remain in her as a separate estate?

She, while claiming to be trustee under a deed absolute in form, purchases from the beneficiary the beneficial interest under that trust. The two estates are, therefore, merged in her, the alleged resulting trust is extinguished, being merged in the legal estate held by her.

The merger can not bring her legal estate into the court, for that would enlarge the scope of the suit. But the merger extinguishing the beneficial estate takes it out of court. The two estates once merged can never be separated. The beneficial interest is dead without resurrection. Neither Mrs. Farnsworth nor any assignee of hers can get into the case on a bill of revivor, for there is nothing to revive; nor can they or either of them come in on a supplemental bill in the nature of a bill of revivor, for there is nothing to supplement nor to revive.

Mr. Hallum, in his affidavit, swears that he retained Mr. Bradford on a contingent fee, and subsequently paid him $200, and directed Eugene Leitensdorfer as agent for himself and Mrs. Farnsworth to make some additional payment to him, and he sets forth in said affidavit fully how the money was obtained to meet the expenses in the prosecution of the claim, one-half being furnished by him, the other by Mrs. Farnsworth; said money amounting to about $7,500, being mostly realized from the sale of lots near Trinidad, one-half of which belonged to him.

This receives confirmation from Hallum's deed to Mrs. Farnsworth, set out in Exhibit 34, in which it is expressly stated that the conveyance is made "in consideration of the sum of two thousand dollars, money advanced to aid in prosecution of the Las Animas land grant claim."

Bradford, on page 3, recognizes Hallum's right to dismiss Shackelford, an associate counsel.

On page 29 he also recognizes Hallum's right to dismiss him, Bradford. Hallum had written to him, criticising what he had done, and Bradford replies: "You add 'you seem to have lost that comprehensive grasp of the questions involved and the remedies to be invoked, that you once had.' If this be your opinion, please enforce it by

act; pay me off and discharge me. . . . I have faithfully served you eight years for less than $400, and can't continue so hard a service."

On page 20 he says: "We had better now hatch out a contract for my fees. Please suggest what it shall be." On page 23 he says: "I asked you what my fee should be; you decline to advise me, but ask that *I* shall state it. I think it should be, say, one-fifth of all we recover, in money or land."

Further, Hallum argued the case on its final hearing before the Circuit Court, and prepared the decree that was signed by the Court.

We submit that this evidence leaves no doubt that Hallum has ever been and still is the *dominus litis* so far as the prosecution is concerned.

## II.

*The stipulation is one which the Court can and should approve.*

(*a.*) Because, as shown by the evidence above referred to, the complainant, at the commencement of the suit, had no such interest in the claim as to enable him to maintain the suit without joining Josephine Farnsworth, his alleged trustee, as a party.

(*b.*) Because said complainant never had such an interest in said grant as would enable him to maintain this suit—in that the deed from the original grantees to Eugene Leitensdorfer, through which Thomas claims, makes him, at best, the owner of an undivided part of the grant, makes him a joint claimant with the original grantees, not a derivative claimant under them in the sense in which the term is used in the act of February 25, 1869, relating to said grant.

(*c.*) Because if complainant ever had a right to maintain a suit in a circuit court of the United States in relation to said grant, his right was barred by said act long before this suit was commenced.

(*d.*) Because appellant is entitled to an order abating the suit, on the ground that the appellant has parted with all the interest he ever had in said grant. V. Daniels Ch. Pr.; title, Abatement.

(*e.*) Because the Circuit Court had no jurisdiction of the suit, in that Craig, the defendant, had no interest in its subject-matter, while a five-hundred-dollar interest in it is needed to give the Court jurisdiction.

(*f.*) Because an affirmance by this Court of the decree appealed from can have no binding effect on any person or on any thing.

(*g.*) Because the suit having miscarried, the appellee should not be compelled to expend a thousand dollars in printing the record.

BENJ. F. BUTLER,
O. D. BARRETT,
*of Counsel for Appellant.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1885.

NO. 48.

WILLIAM CRAIG, *Appellant*,

*vs.*

THOMAS LEITENSDORFER, *Appellee*.

**Evidence in behalf of Appellant in support of motion for rule to show cause.**

BENJ. F. BUTLER,
O. D. BARRETT,
*Of Counsel.*

R. O. POLKINHORN & SON, PRINTERS.

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

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WILLIAM CRAIG, *Appellant*
*vs.*
THOMAS LEITENSDORFER, *Appellee.*
} No. 48.

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**Evidence in behalf of Appellant in support of motion for rule to show cause.**

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By leave of the Court granted on the fourth day of November of this present term, the appellant, by his counsel, Benjamin F. Butler and O. D. Barrett, submit the following affidavits and exhibits in support of their motion "to show cause," &c., filed herein on the 19th day of October last.

BENJ. F. BUTLER,
O. D. BARRETT.
*Of Counsel.*

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## Affidavit of Benj. F. Butler.

I, Benjamin F. Butler, counsellor at law, on oath, depose and say:

That early in the year 1875 I was retained as counsel by Colonel William Craig, late of the U. S. Army, then living at Denver, Colorado, on a certain ranche of land known as the Las Animas Grant, a very considerable portion of which Craig claimed, to take part in the discussion of questions of law and fact in regard to the title of said lands. Under the acts of Congress of June 21, 1860, and February 25, 1869, the claims of certain claimants to said lands were to be determined by the Register and Receiver of the General Land Office of that district, "to their satisfaction," and upon their adjudication, and report it became "the duty of the Surveyor General of the district to furnish proper approved plats to said claimants, which shall be evidence of title; the same to be done according to such instructions as may be given by the Commissioner of the General Land Office."

I found that Craig's claim, as a derivative claimant, had been heard before the Register and Receiver, but that the Commissioner of the General Land Office declined to give any instruction to the Surveyor General to prepare and approve such plats, because one Thomas Leitensdorfer claimed an appeal from the judgment of the Register and Receiver of the General Land Office, claiming that the Commissioner of the General Land Office might overrule the "satisfaction" of the Register and Receiver upon a new hearing; whereupon I took measures to have the question, whether that appeal could be allowed, submitted to the Attorney General, who, after full hearing of the parties, decided that no such appeal lay.

Such opinion being transmitted to the President of the United States, he issued an order to the Secretary of the Interior, of which the following is a copy:

In the matter of William Craig, owner of certain lands in Las Animas Grant, Colorado.

In accordance with the opinion and recommendation of the Attorney General upon the questions submitted to him, the Commissioner of the General Land Office is directed to instruct the Surveyor General of Colorado to deliver to Col. Wm. Craig an approved plat of the land adjudged to him by the Register and Receiver of the Pueblo Land District in that State, dated February 23d, 1874.

If, in the opinion of the Commissioner of the General Land Office and the Secretary of the Interior, the amount of land owned by Wm. Craig is less than that heretofore awarded, then the erder upon the Surveyor General of Colorado may be for the amount of land deemed due him.

U. S. GRANT.

Executive Mansion, March 2d, 1877.

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Whereupon, after due notice to the parties, they were heard before Mr. Marble, the Assistant Attorney-General for the Interior Department, under the order of the Secretary, upon the question of what land the Surveyor General should plat to Craig, approved under the order and directions of the Commissioner of the General Land Office.

After the hearing, the order of the Commissioner of the General Land Office was given to the Surveyor General, that after giving plats which had been adjudicated by the Register and Receiver, in favor of twelve other derivative claimants, the remainder of the Las Animas Grant, substantially as confirmed, was to be platted to said Craig, he paying the costs of the survey thereof, amounting to some three thousand and odd hundred dollars; which order was obeyed and the plat issued when the surveyor's fees were paid.

Before the termination of the question by the Attorney-General, Col. Craig, in consideration of certain services and legal expenses rendered to him in other cases before the courts, and in consideration of unpaid services in this case, conveyed to me, as security, his equity of redemption in said land, subject to certain prior mortgages. This deed, which became substantially unimportant afterwards, I have mislaid or else delivered to the Colorado Cattle Company, so that it is beyond my reach.

After the plat was delivered and the boundaries of Craig's title ascertained definitely, in consideration of further moneys to him paid and other good and valuable consideration, Col. Craig conveyed to deponent, by deed duly executed, all his right, title and interest in said lands as described in said deed (a copy whereof is herewith filed), and afterwards said deed was duly recorded in the proper record office.

Soon after, Col. Craig uniting in the transaction through another deed, I conveyed to the Colorado Cattle Company, a corporation organized under the laws of Connecticut, of which I was neither a promoter nor stockholder, all the land which came to me from Craig. But, as these conveyances to said cattle company were made after the filing of the bill and amended bill of *Leitensdorfer* vs. *Craig*, I pursue this title no farther.

After this suit was commenced, I was not of counsel in it for Col. Craig, or for the Cattle Company, until after the first appeal was entered in this Court; although, when called upon for information in regard to the suit, I furnished such as I had.

Meantime, a motion was made by Mrs. Leann King to be permitted to intervene in this suit in this appellate Court, upon a title acquired after the appeal was taken, the foundation of which was a claim against John Hallum and Leitensdorfer, for fees for conducting this very suit, for which

she got judgment for ten thousand dollars, and levied the same upon the land in controversy.

Of that motion I had no notice. An order was passed, of which I did not learn until more than a year had past.

When I came to examine the Record, in view of preparation for trial, I saw, to my astonishment, that at the date the suit was brought, it appeared by a record of the deed, in the proper county in Colorado, that Craig had no interest whatever in said land at the time said suit was brought against him. Upon further examination, it seems that Leitensdorfer had parted with his interest in the land to Hallum prior to the commencement of this suit, so far as the record stood in Colorado, and that appears in the record of the suit.

It seeming to me, therefore, that the question before the Court was simply a moot question in regard to what should be done concerning title to land between parties who had no interest in or title to the land, and therefore determined nothing, I sent an assistant to examine the title in Colorado. Upon his reporting to me the state of title, as above described, and farther, that John Hallum had been the promoter of the suit, and claimed the title in himself at the time the suit was commenced, I directed him to find Mr. Hallum and to suggest some of the difficulties that I found in regard to the condition of the suit, and whether he (Mr. Hallum) was aware of them. Mr. Hallum informed him in substance, First: That he was the promoter of the suit, and the title in whole or in part stood in his name from Leitensdorfer, but that he had no knowledge or information up to that time that the title of Craig appeared of record to have been extinguished before the suit was brought, and added, that if he had so known, he never should have brought the suit.

Learning these facts, I sought an interview with Mr. Hallum, who informed me that he had employed Mr. Bradford

to commence the suit; that he himself had paid the fees in the case; that he had a judgment against him for ten thousand dollars for unpaid fees and had full right to control the suit, and that, in his judgment, after the title had been explained to him, there was nothing to be obtained in fact for the parties bringing the suit from a favorable decision. In that he seems to be corroborated by the letters which he received from Bradford which are filed as part of the evidence to sustain this motion, wherein a like opinion is stated. Believing this fully, I entered into stipulation with him, which I filed at the close of the last term; Mr. Hallum being then in Washington, hoping that the owners of the lands would thus be enabled, the title being settled, to get the pasturage of it for the last year.

I can only add, that in this matter I acted in the fullest good faith with Mr. Hallum in an endeavor to bring, what seemed to me, a very expensive and useless litigation to a close, and most certainly I did not mean to act in contravention of the claim of Mr. Allen, for whom Mr. Bradford now appears in the case, such claims or such personage, even never having been heard of by me until long after that time, to-wit: during the present term of this Court.

And further deponent saith not.

BENJAMIN F. BUTLER.

Subscribed and sworn to before me, this 10th day of December, in the year of our Lord eighteen hundred and eighty-five.

[SEAL.] JOHN W. PARSONS,
*Notary Public.*

## Affidavit of John Hallum.

WM. CRAIG, *Appellant*,
*vs.*
THOS. LEITENSDORFER, *Appellee.*
No. 48.

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John Hallum deposes and says: My connection with the Leitensdorfer derivative claim to a part of the Las Animas grant in Southern Colorado dates back to the spring of 1873, whilst the claim was pending before the Register and Receiver of the local Land Office at Pueblo. Eugene Leitensdorfer, representing himself as agent for his sister, Mrs. Josephine Farnsworth, had been for eight or ten months prior to that time, urgently soliciting me to take entire charge of the claim for one-half interest in the same, each party to pay one-half the expenses attending the prosecution of the claim. Finally, the contract was consummated upon the conditions above stated, and I assumed the entire control and management of the claim and all the litigation growing out of it. I was then living in St. Louis, Mo. I discharged all attorneys then having any connection with the claim. E. C. Holmes and Gov. Hinsdale and partner, all then resident attorneys of Pueblo, had been previously employed by Leitensdorfer (Eugene). I also discharged one James B. Buck, claiming to be an att'y, who had fraudulently obtained a power of attorney from Thomas Leitensdorfer, empowering him to control the claim, and I caused his power of attorney to be revoked. Whilst I lived in St. Louis I made four trips to Pueblo, Colorado, for the sole purpose of attending to this land claim, and I carried Eugene Leitensdorfer with me on two of these trips. I defrayed my own expenses in making these trips, and I paid out of my own means more than one thousand dollars. In

January, 1874, I retained Robert H. Bradford on a contingent fee. Mr. Bradford did not then object to a contingent fee, but long afterward he complained that the undertaking involved much more labor than either of us at first anticipated, and insisted that he must be paid some compensation, and I, to a limited extent, consented to modification of the original undertaking, and at one time I paid him $200.00, and I directed Eugene Leitensdorfer, as the agent of Mrs. Farnsworth and myself, to make some additional payment to Mr. Bradford, which was done. The exact amount I do not now recollect.

In January, 1874, Mrs. Farnsworth and her ag't, Eugene Leitensdorfer, insisted that it would be less expensive for me to move to Colorado, where I could attend to our interest as emergencies might demand, and I concurred in this opinion, and in May, 1874, I sold my residence in St. Louis, abandoned a good practice there, and moved to Trinidad, Colorado, and remained there attending to the joint interests of Mrs. Farnsworth and myself in the land claim, from the 20th day of May, 1874, until the 10th day of October, 1876. This move was made at a great pecuniary sacrifice, both of business and in cash. The move above cost me $400.00 in cash, which was paid out of my individual means. I had in cash, of my own means, one thousand dollars in addition to the $400.00 cost of removal. Mrs. Farnsworth and myself, immediately on my removal to Colorado, became involved in very expensive litigation over the Overland Hotel property in Trinidad. This property was worth $10,000.00. The expenses attending this litigation amounted to almost $1,500.00. I exhausted all the cash I had on hand defraying these expenses before I began to call on Mrs. Farnsworth for contributions to the expense account incurred in the prosecution of our joint interest—this in the fall of 1874—and before calling on her for any contribution, I had expended of

my own means in prosecuting our joint interests very near, if not quite, the sum of $2,500.00.

Mrs. Farnsworth, always, sooner or later, responded to these calls for aid in prosecuting our joint interests; sometimes she would provide for these expenses, as I had at first done, out of her individual means.

Mrs. Farnsworth and myself made many sales of lots and lands embraced in our joint claim. The amount realized on these sales approximates $7,500; it may be a little more or a little less. I have never had an adjustment of accounts between Mrs. Fansworth and myself. All the expenses attending the litigation growing out of our joint interest in the Las Animas grant were paid, first by me, as above indicated, then, for a while, by Mrs. Farnsworth, who was reimbursed out of the sales above stated.

I moved to Lonoke, Ark., in Dec., 1876. In March or April, 1877, as well as my memory serves me, without referring to the papers, the litigation with Wm. Craig commenced. I went then from my home in Arkansas to Denver, a distance of 1,300 miles by rail, to commence this suit. I spent several weeks and several hundred dollars on expense account. Mrs. Farnsworth paid the expenses on this trip.

Again, in the fall of 1878 or '9, I went to Denver to take proof and prepare the case of Thos. Leitensdorfer *vs.* Wm. Craig for trial, and I remained in Denver four months, attending solely to this business, visiting Pueblo and Trinidad during the time engaged in preparing the proof.

The expense account aggregated, or approximated, one thousand dollars on this trip, and were met by proceeds of sale on joint account of Mrs. Farnsworth and myself. A portion of this last expense account was at first paid by Mrs. F. out of her individual means, but we made a good many sales during my protracted stay in Denver, and she was reimbursed out of our joint sales.

When the case was finally argued, I again went to Denver, and in person took charge of the case, and drew the final decree. In the meantime I had employed Mr. J. Q. A. King to attend to the minor details of the case during my absence and under my direction, aided by Mr. Bradford. For these services his executrix recovered a very unjust judgment against Thomas Leitensdorfer and myself; during the progress of this suit I went to Denver once or twice, the expenses amounted to something approximating $1,000, and were paid out of the joint funds of Mrs. Farnsworth and myself, realized from sales of our joint interest.

These lawsuits, as indicated, involved a great amount of labor and time, and large expenses, and great sacrifice by me.

JOHN HALLUM.

STATE OF ARKANSAS, } ss.
*Sebastian County.* }

This 1st day of December, 1885, personally appeared before me John Hallum, to me personally well known, deposes and says that the matters and things stated in the foregoing affidavit are true, to the best of his knowledge and belief.

[SEAL.] S. H. SHERLOCK.
*Notary Public.*

**Exhibit, 1.**

WASHINGTON City,
*Tuesday, April*, 24 1877.

Mr. JNO. HALLUM, under cover to
Mr. Eugene Leitensdorfer,
South St. Louis, Missouri.

My dear Sir :

Y'rs of the 17 inst. came 19 inst. Please say to Mr. Leitensdorfer, that his to me of the 17 inst. and 18 inst. both came on 21 inst., and that in the latter I rec'd y'rs to him of the 17 inst.

Craig's plat reached the desk of the clerk in charge this morning, and I inclose copy. The S. G. says he makes and approves the thing by Grant's order, which strengthens our position that the delivery of that plat is a ministerial act, and may hence be enjoined.

Our bill is not to try title. The court can't pass on that question till the Com. and Sec'y act. Our bill is simply to put the wheels of the Comrs. jurisdiction in motion, and meantime to keep thieves from stealing the land. Be more cheerful. Don't invite failure by yr. doubts.

You were due in Denver at 4 a. m., 21 inst. I suppose it will be about 1 p. m. before the plat can get to Denver again for final delivery, so you will have time to serve yr. order on the S. G. before. It seems he made the plat in triplicate originals, keeping one and sending 2 here. One of the latter the Com'r will keep, and return the other for delivery

to Craig. The plat is bad, for it certifies that *all* the land in it is Craig's, whereas he owns but a small proportion, being that tinge pink. The fellow adopts that color, I suppose, because the affair is so godly, and *rubor est color virtutis*. Yrs.

ROBT. H. BRADFORD.

Please send me a literal copy of the indusements and amendments to our bill, if filed.

R. H. B.

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**Exhibit, 2.**

WASHINGTON City,
*Thursday, Sept.* 13, 1877.

Mr. JNO. HALLUM, Lonoke, Arkansas.

My dear Hallum:

Y'rs of 30th July last came on 3rd ult. I will be glad of any paying cases that you can send us. * * I am now preparing an amended bill in our injunction case in Denver. The damage done us by the improper dissolution of the injunction is so great as to be nearly irreparable. Had you been there, as I so strongly urged, I think the writ would have been sustained, for you are old in the case and grasp it better than King and Shackelford. If you don't go out and try the case on our amended bill we will lose the case entirely, I fear. So strong is this impression, that I would not write the amended bill,

if I did not believe that you would be in Denver to try it.

* * * * * *

Y'rs truly,

ROBT. H. BRADFORD.

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**Exhibit. 3.**

WASHINGTON City,
*Friday, November* 8, 1878.

Mr. JNO. HALLUM, Denver, Colorado.

My dear Hallum:

J. O. Shackelford's of the 5th ult. came 8th ult., asking how we must meet Craig's answer. As you have said that you would discharge Shackelford, I did not reply to him. * * *

Yours truly,

ROBT. H. BRADFORD.

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**Exhibit 4.**

WASHINGTON CITY,
*Tuesday, Dec.* 3, 1878.

MR. JOHN HALLUM, *Denver, Col.:*

MY DEAR FRIEND: The answer of Carig to our supplemental bill, says, on p. 20, that complainant has no interest in the 16,000 acres, and denies that the title, alleged by complainant, is a good one within the act of 21 June, 1860, and 25 Feb'y, 1869.

It seems that, in June, 1873, while complainant's claim was pending before the R. and R., he conveyed it to you by recorded deed; and that, about April, 1874, you, keeping 7-16 of the claim, conveyed the remaining 9-16 to Mrs. Josephine Farnsworth, complainant's sister, by unrecorded deed, 6-16 being for her, and 3-16 in trust for complainant. These two deeds, it seems, are absolute in words, but were intended, by all parties, to cover the trusts above indicated. I presume you will prove these trusts on the trial. If so, the requirement of the code of practice of Col. will be satisfied, and the objection of Craig answered. I don't know the rules of Col. about champerty; but, as this land was not held *adversely* at the time of the sale to you, as the sale was *after* the filing of the claim before the surveyor general and R. R., as it was in trust for the complainant as to 3-16, I don't think the sale champertous. *Dubois* vs. *McLean*, 4 McLean, 486; *Lewis* vs. *Bell*, 17 Howard, 616; *Roberts* vs. *Cooper*, 20 Howard, 467. A poor man, owning nothing but his land claim, would often go without counsel, if precluded from paying him by an interest in the land.

But, if complainant had no interest, in a technical sense, the *principle* of the local code of practice would not preclude him from suing Craig; for, as I said once before, complainant does not seek to get any land by the decree, but only seeks to get a decree corralling Craig's plat. He must seek his land before the Commissioner, after the court cancels the

plat. Besides, if complainant could be said to ask a decree for land, the true owners could not be hurt: for the land *must* belong to Craig, who is a defendant, or to the U. S., whose officer is a defendant, or to you, who are counsel, assenting to the suit by the complainant, or to Mrs. Fansworth, who is a witness, and cognizant of the suit therefor. If the true owner of the land would be hurt by the complainant's suit, why does he not intervene?

But, the best answer to the objection of a want of interest in the complainant, is that the court has no jurisdiction of the merits of complainant's claim, and can't, therefore, possibly award him any land. Complainant having conveyed part of his claim after filing all before the R. and R. should enable his vendees to protect the interest of all before the Commissioner after the hostile decision of the R. and R. Honesty requires this. But Craig's plat prevents the Com'r from doing justice to his vendees. Hence, it is the complainant's duty to remove that obstruction. That removed, the Com'r can go on and confirm the title which complainant has partly conveyed to you and Mrs. Fansworth, and thus the duty and interests of complainant, as vendees, will be fulfilled.

* * * * *

On page 20 of Craig's answer he attacks the title of complainant. Possibly you should demur to this. The Court has nothing to do with the title. Leitensdorfer's appeal is now pending before the Commissioner. In that case Leitensdorfer presents

his title and asks its confirmation. The Commissioner has no exclusive jurisdiction on the question of title. The Court at Denver can no more try the title than it can try your liability on a note, a suit on which was pending against you at your domicile in Ark. If sued on such a note in Denver, you could file a transcrip of the record of the suit at Lonoke, Arkansas, and show that the Court there had jurisdiction. Then the Court at Denver would not even inquire if the transcript made out a *prima facie* case against you, but, seeing that, in fact, you had been sued on the note before a competent Court and that the suit was still pending, would sustain your plea of lis pendens and refuse to entertain the second suit against you. Our case is the same. The Commissioner is seized of jurisdiction and the judiciary can't interfere till the Commissioner and Secretary, —the Executive Department has finally disposed of the case. This is the principle, tho' imperfectly applied, which animated the Court in Denver when it dismissed our injunction and the Court here when it dismissed our petition for a mandamus. Compel the Court now to give us the benefit of the principle. In fact, Dillon and Hallett said, in dismissing Craig's demurrer and ordering him to answer, "Under the act of June 21, 1860, as amended February 25, 1869, the validity and extent of the claims of Vigil and St. Vrain, and all of the derivative claimants were matters which it was contemplated and provided, should be decided by the executive instead of the judicial department of the

Government, &c., &c. The exclusive jurisdiction of the Commissioner in all such cases, is not matter of conjecture. He exercises such jurisdiction in a hundred important cases daily. His exclusive power is clearly defined by long practice. I know and feel this, and hence, would, under no circumstances, accept a decree from Hallett awarding us our land. We only ask him to take away the manacles which Grant's rascality have placed on the hands of Williamson and to leave the Commissioner free to do justice between us and Craig. I tell you sir, that as surely as Hallett usurps the jurisdiction of the Executive Department and awards us the land, so surely will the Supreme Court of the United States here spit upon the stupidity. If Hallet arrives at the conclusion that an appeal lies to the Commissioner, that our appeal is pending before him, his duty is simply to decree the nullity of Craig's plat in order that the Commissioner may be free to go on and try our appeal. Don't let the Court blunder on the vital matter. I am heartsick already with the infamous mistake which Shackelford led the Court to commit against us. By the way, strike out of his interpolations as pray that the Court will hold Craig as our trustee.

You have now, all the law and proof you need. I have dug up the evidence with immense personal labor, spending weeks in searching for the proper originals to be copied for us. They were widely scattered.

* * * * *

Hoping that the God to whom vengeance belongs will enable you to achieve a victory over hell, Craig, and Butler, I remain,

Your friend,

ROBT. H. BRADFORD.

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**Exhibit 5.**

WASHINGTON CITY,
*Friday*, 27 *Fr.*, 1880.

Mr. JOHN HALLUM, *Lonoke, Arkansas:*

I got from you, while you were at Denver, some interesting and valuable letters, not requiring specific replies, which I failed to acknowledge in time. Among them were yrs. of 17 Jan., '79, about the east line of the grant; of 17 Jan., '79, about nullity of Craig's deed from Madame Vigil; of 21 Jan., '79, about the *interest* of Thomas Leitensdorfer in our claim; of 22 Jan'y, '79, about the Santa Fe records; of 27 Jan'y, '79, about the fixing the case for trial; of 1 Mar., '79, about the dismissal of Shackelford (thank God!); and of 29 Oct., '79, about my books, &c. Judging from King's recklessness in other things, I fear for the safety of my books in his hands, tho' I think as you do, that he should keep them till Hallett comes to a focus. When will that be? I see no cause for the infamous delay. It's a great outrage. I fear if Grant is nominated before decision, it may unconciously weigh with Hallet against us; and I am sure, judg-

ing from the political blindness of the judges of the S. C. U. S. in the electoral commission, that Grant's possible election would weigh tremendously against our case after it reached the S. C. U. S. Pray do all that you properly and possibly can to put fire on Hallett's back, and make him crawl in *some* direction.

Yr. friend,
ROB'T H. BRADFORD.

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**Exhibit 6.**

WASHINGTON CITY,
*Thursday*, 8 *July*, 1880.

To Mr. JOHN HALLUM,
*Att'y-at-Law, Lonoke, Ark:*

MY DEAR SIR:

Yr. P. C. of the 4th inst., from Denver, Col., came this morning. It seems to me a needless expense to send me a transcript of the record in *Leitensdorfer* vs. *Craig & al.*, before the judgment becomes final by the lapse of delay for appealing; for I think Butler, to take advantage of our poverty, will appeal, hoping to worry us out or compel a compromise. But, if you wish a transcript now, have it as full as possible, especially as to proof of fraud. I would omit nothing except, if necessary, the copies from the Bureau Department. But I forwarn you that a decree of nullity against Craig's title will operate as a mere *brutum fulmen*,

unless it be followed by a surrender of his titles and their actual cancellation by the court. See 11 Howard, 569. Nothing short of that can remove the obstacle now preventing the Com'r from considering our appeals. By the way, as much time must yet pass, ere we can get the U. S. title or the Thos. Litensdorfer claim, and deaths may intervene, we had better now hatch out a contract for my fees. Please suggest what it shall be, and remember, *years of work yet remain here* ere we are out of the smoke.

Yr. friend,

ROBT. H. BRADFORD.

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**Exhibit 7.**

WASHINGTON CITY,
*Wednesday*, 14*th July*, 1880.

To Mr. JOHN HALLUM,
*Lonoke, Arkansas:*

* * * * * * *

My objection to so much of the decree as declares the nullity of the R. and R.'s award to Craig, is chiefly this, that it is wrong and must be reversed if the case goes to the Supreme Court, and that hence if it stands the error may induce Butler to appeal.

Doubtless the prayer for general relief, in our bill, gives some sort of color to this feature of the decree; but the bill *itself*, and all that I have ever written or said, or printed, in this case, proceed on the in-

vulnerable ground that an exclusive, unavoidable, *statutory* jurisdiction was vested in the Commissioner by the act of 4 July, 1836, S. 1, (5, Stat. 107,) and R. S., Sec. 453, to consider all the appeals now pending before him, and that we invoke the aid of equity to recall Craig's title and vacate it, as an obstruction to the Commissioner's statutory and customary appellate jurisdiction. Such jurisdiction has been exercised by him in ten thousand cases, and is familiar to the Supreme Court, and you may be assured that the Court would not allow the Circuit Court to take it away by indirection.

It was well enough for Love, in his opinion, to say that the decision of the R. and R. for Craig was void for fraud, and I want all the proof of that fraud to be put before the Commissioner, that he may be guided to a correct decision on Craig's title. But the Commissioner is vested by Congress with judgment and discretion to review the decision of the R. and R. for Craig, and the judicial power can't now interfere to deprive him of that discretion, and assume it for the judge. By two solemn appeals to the Commissioner, one against the decision allowing Craig's claim, and another from the decision disallowing Thomas Leitensdorfer's claim, we have expressly invoked the Commissioner to decide Craig's claimto be void, and the whole design of our court proceedings since, has been to remove the obstacle which prevents the Commissioner from exercising the appellate power invoked by us. If Craig's patent be cancelled, then the Com'r will be free to

consider all the appeals and allow to the successful appellants the 73,251.55 acres now patented to Craig; but that area cannot be disposed of on behalf of other claims, while it is absorbed by an outstanding and hostile title. The United States will not knowingly do what would amount to patenting the same land to opposite parties.

If, on the trial of the appeal, the Commissioner affirms the R. and R., which is not likely, we can appeal to the Secretary. If he affirms the Commissioner, which is not likely, we, being in possession, would hold on till the U. S. disposes of and patents our land to other persons, and could then await an ejectment by them. However, you know the local practice in Colorado, on this point, better than I. But I am very certain that the Land Department must pass judgment on Craig's title.

There will be time enough to have the Craig titles caveated in fact, if it can be done by the 4th of March next. I am sorry to say that, in my opinion, there is too much corruption in the General Land Office here, as well as in the Department proper, to enable us to cope successfully with Butler. I would have small hope of justice if our appeals were disposed of during this administration. I say this reluctantly, and only because, as associate counsel in the case, it is right that you should know it. I think Butler and many other rad. knaves will become Democrats as soon as we elect Hancock in November next. But he is so well known here that, under the incoming Democratic

administration, I think he will be powerless in the Interior Department and Land Office here.

* * * * * * *

The only doubtful points in our case are two which must be well handled before the Commissioner and Secretary: 1st. What is the east line of the grant? 2d. Can Leitensdorfer get a title from the U. S. in severalty, under an original deed making him but a tenant in common with five others of an undivided estate? If the record at Denver contains any evidence on these points, that evidence should be in your transcript; and, indeed, as I think, the transcript should contain everything not now in the General Land Office, on the first point. I have but little doubt on the second: the Land Office is much embarrassed; but, I think, on that point, also, we have the right side. It must be some years yet before we will get our title.

I asked you what my fee should be. You declined to advise me, but asked that *I* shall state it. I think it should be, say one-fifth of all we recover, in money or land. The truth is, the game is not worth the candle. I don't think the whole value of the sixteen thousand acres could pay us for what we have done and suffered in this unparalleled conflict against hell in high places. Nothing could have induced me to continue in the case but a sense of the wrongs inflicted on my clients by the infinite rascals whom we have opposed and oppose; for no lawyer can afford to fight for a decade on a contingent fee. The drunkenness of Humphreys, the ignorance

and lyings of Chandler, the corruption of Grant and Pierpont, and the blunders of the courts, have almost made me forswear the practice of land law. When you come here, you must, of course, make my office your headquarters.

Yours truly,

ROBERT H. BRADFORD.

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**Exhibit, 8.**

WASHINGTON City,
*Wednesday, July* 27, 1880.

To Mr. JNO. HALLUM, *Lonoke, Ark.*

MY DEAR FRIEND:

Eugene Leitensdorfer's, by wire, of 1st inst. came 2d inst., saying we had gained our case against Craig and Butler. Y'r letter of 2d inst. came 6th inst., giving the particulars of the glad tidings. The Rocky Mountain *News* of 3d inst. came this morning, with a full report of the opinion of the court. It is a good opinion in the main, but the decree goes beyond the relief as prayed for in the supplemental bill which I drew, and falls short of it in one respect. The decree annuls the award or decision of the R. & R. for Craig. This I did not ask, and the court can't grant; and if the real decree contains such an error, it should be cured by a remittitur. That decision can only be annulled by the Land Department. The decree of the court should also order the surrender and *cancellation* of

Craig's evidence of title. See my brief on our supplemental bill, p. 10, and see also, *U. S.* v. *Hughes*, XI. Howard, 552, 569. See that the clerk *makes the cancellation.* That is an important matter, sometimes neglected. I suppose the bill I drew was amended to pray for the cancellation of Craig's patent, was it not? I shall be pleasantly disappointed if Butler does not engineer an appeal.

I rejoice with you at our success thus far. Much more remains to be done.

Y'r friend,

ROBT. H. BRADFORD.

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**Exhibit 9.**

8TH AND F STS., N. W., WASHINGTON, D. C.
FRIDAY, *Oct.* 1st., 1880.

TO MR. EUGENE LEITENSDORFER, *South Saint Louis, Mo* :

MY DEAR SIR: Yrs. of the 20th ult., about my fee, came 24th ult. I also have my books and the partial transcript of the record of our case in the Circuit Court of the United States at Denver. I never intimated an acceptance of your offer of $5,000 or more, as a contingent fee in your case, and never intended to accept it. Nor did I intimate that you should be as liberal to me as Mr. Welton has been. Knowing your great sacrifices in this case and your heavy expenses, I would not accept so much as one-half your claim. I referred to Welton's deed to show

that a fee, wholly contingent on success, should be a very liberal one. So far from charging you a half interest in the land, I proposed to Mr. Hallum a one fifth interest, which he imagines is too much. I see, in his testimony in the case, that he contemplates paying some of the counsel fees out of the one half interest which he owns in the claim, and I presume therefore, whatever my fee is to be, he, as one of the claimants and owners, will join you and your brother and sister in paying it. But, as we can't now harmonize about the fee, I will defer the further consideration of the matter till Mr. Hallum comes here; tho' I say now, that if you all can afford to pay me $2500 cash, less the $324, fees already paid me, I will cheerfully withdraw from the case. My various briefs and pleadings may enable you to finish the case without further assistance.

Yours truly,

ROB'T. H. BRADFORD.

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**Exhibit 10.**

WASHINGTON CITY,
*Friday*, 9 *Dec'r*, 1881.

TO JOHN HALLUM,
*Attorney-at-Law, Denver, Col.:*

DEAR SIR: Yours of the 3d inst. came 7th inst., too late for attention. I examined our case yesterday, and now write result. You err in supposing that the appellee can, under rule 9 of the S. C. U. S., have the decree below *affirmed*, by docketing and

dismissing the appeal. The case is simply dismised. The *result* will be the affirmance of the decree below, or rather, its finality; but the Supreme Court will not order this. You err, too, in supposing that I can make the motion, at once, to docket and dismiss. The rule is, to make all motions on Mondays. (See general rule 5.) The court sometimes hears brief motions on other days, but don't like to do so, and lawyers don't like to ask such exceptional favors. I don't think, though, the court would grant an order to docket and dismiss our case, on the certificate which you send, for it don't show when the appeal was returnable. If you wish me to make the motion, you should send me copy of appeal-bond, or some proof to show when the court below made the appeal returnable. it was probably made returnable to the next term of the S. C., namely, to the October term, 1880, as Rule 9 required that; but the *fact* should appear in our proof. It is doubtful, therefore, whether the court here will assume any jurisdiction of the case at all, even to dismiss it. The motion to dismiss should have been made last term. The appeal is now dead, and the Supreme Court without jurisdiction. All that you need, I think, is to show the court below that the transcript has not been taken out by Craig, the appellant. That the clerk below can show, or I can send you a certificate of the Clerk of the S. C. that the appeal has not been filed here.

The decree was entered against Craig the day it was rendered, namely, 2d July, 1880. The decree

will become final on the 3d July, 1882. (R. S., Sec. 1008.) If we dismiss his appeal now, he could appeal again before that time; but now his hands are tied. Would it not be well for us to be quiet till 3d July, '82, and then ask execution?

But I expect little aid from the decree for Leitensdorfer. It omits a vital point, to which I called special attention. It does not order the surrender of Craig's patent and plats for cancellation. His patent being still outstanding, I don't think the Com'r or Secretary here would allow to Leitensdorfer another patent for part of the quantity of land embraced in Craig's patent. This is their rule, and it seems reasonable. It is too late to amend the decree (Equity Rule 85), and too late for a rehearing, though *we* might appeal (*Ib.*, Rule 88), and then the Supreme Court might give us relief by modifying the decree below. (R. S., Sec. 701.) This is a mere suggestion. A new bill might be better.

In haste, yours truly,

ROBT. H. BRADFORD.

I return the clerk's certificate sent by you, for such action or changes as you think best.

R. H. B.

**Exhibit, 11.**

WASHINGTON City,
*Thursday, December 29th*, 1881.

To Mr. JOHN HALLUM, Denver, Col.

MY DEAR SIR:

Y'rs of 14th inst. came 19th inst., criticising my views about the necessity of cancelling Craig's plats and patent. You add, "you seem to have lost that comprehensive grasp of the questions involved and the remedies to be invoked, that you once had." If this be your opinion, please enforce it by act: pay me off and discharge me. Take all my papers, which discuss the questions still unsettled, and let me give my attention to other cases more remunerative in thanks and money. I have faithfully served you eight years for less than $400, and can't afford to continue so hard a service. As for my reasons for holding that Craig's titles *must* be cancelled, you will find them in my answers in *King* v. *You & Leitensdorfer*, and *Shackelford* v. *Same*. I prepared my answers in those cases with great care and labor, and gave them to the Commissioner on the 24 inst.; but he did not mail them till last evening. The entire costs attending this business are $13.76. E. L. sent me $25. I will account for the rest. Y'rs of 20th inst. came 26th inst., returning the amended record in *Leitensdorfer* v. *Craig*. I will get the appeal dismissed, pay costs, and send you or E. L. bal. of the $25. Y'r P. C. of 20th inst. came 24th inst. Y'rs of 24th inst. came 28th inst., asking my affidavit of cost in the Craig case, and evidence of

dismissal of Craig's appeal. You shall have all. The Supreme Court of the U. S. will not sit till after 1 *prox.* Y'rs by wire of 24th and 27th insts. came and were ans'd.

Y'rs truly,

ROBT. H. BRADFORD.

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**Exhibit 12.**

WASHINGTON CITY,
FRIDAY, *Jan'y* 27, 1882.

To Mr. JOHN HALLUM, *Lonoke, Ark.*

Yours of 24th ult. came 28th ult., and I inclose my affidavit of this day, showing the costs paid by me in preparing the proof used in *Leitensdorfer* vs. *Craig.* There were other costs paid by me, but I can't at this late day, identify them with any specific pieces of evidence filed in the circuit court in that case. You ask that the clerk in Denver be supplied with official notice of the dismissal of Craig's appeal. The official notice will be the mandate or *procedendo;* but "by the practice of the court, no mandate or *procedendo* issues in any case, during the term in which the judgment is rendered, unless on special order of the court." (Phillips' Practice, 344, ed. of '72.) It issues after adjournment on application. (*Id.*)

The within affidavit has cost me about ½ a day's work. My deposition in *King* vs. *You & Leitensdorfer* and that in *Shackelford* vs. *Same*, cost me

about a week's work. You have had about 8 years of toil and care from me for less than $500, and I have not even a written contract for fees with you, though I would not again do all I have done for you for less than $10,000. This condition of things must not continue much longer. There is a limit to a lawyer's endurance, even in a just cause. I have a family to support.

Yours truly.

ROB'T H. BRADFORD.

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**Exhibit 13.**

WASHINGTON CITY,
THURSDAY, 26 *Jan'y*, 1882.

Mr. JNO. HALLUM, *Lonoke, Ark.*

DEAR SIR; Yours of 20th ult. from Denver, came 26th ult. and was attended to. Yours of 13th inst. came 16th inst. when I was very busy, as I am yet. Craig's appeal was on my motion, docketed and dismissed with costs on 16th inst. by the S. C. U. S.; but the rule is not to issue the mandate till the end of the term. I sent you the Washington *Post*, containing notice of the dismissal of the case.

I have no idea that the Commissioner or Secretary, contrary to principle and practice, will take up Leitensdorfer's appeal until you get the court below to actually revoke and cancel Craig's plat and patent. Hence, I don't thing you could do any good by coming here before that is done; save that

you would then become convinced of the absolute necessity of canceling Craig's title before our appeal to the Commissioner can be heard. I will write again soon.

Yours truly,

ROB'T H. BADFORD.

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## Exhibit, 14.

DEED FROM VIGIL AND ST. VRAIN TO EUGENE LEITENSDORFER.

We the undersigned owners and possessors of the land included between the Pourgator (Rio de Las Animas) and Huerfano river, possession whereof was designated in order to impel and facilitate means to settle thereon, and for which object we have solicited and obtained the same from the good grace of the government, do of our free will donat e to Eugene Leitensdorfer and successors the one-sixth part of the land which our possessing in said locality embraces, withdrawing therefrom all our rights so that he to whom we execute this deed may enjoy uninterrupted possession.

Such is our good right provided that we have to give gratis to such families who go there land to live on under such stipulations, and such arrangements as both parties may agree upon in order to benefit the intended colony. We therefore gratefully extend this extra judicial document on common paper for want of corresponding stamp paper, being as authentic compelling us to submit and comply with it.

In witness whereof, we subscribe Taos, New Mexico, 7th March, 1844.

Witnesses:

LEWIS LEE,
CARLOS BEAUBIEN.

CORNELIO VIGIL,
CERAN ST. VRAIN.

UNITED STATES OF AMERICA, }
*Eastern District of Missouri.* }

Personally, on this 30th day of September, in the year 1872, before me, the subscriber, Clerk of the United States Circuit Court for the District aforesaid, appeared Eugene Leitensdorfer, and made oath and said that the writing on the other page of this sheet of paper is a true copy of a translation of the original deed (which is in the Spanish language) from Cornelio Vigil and Ceran St. Vrain to him, the said Eugene Leitensdorfer. That the said original deed was by him left with Hiram Crittenden, of St. Louis, Missouri, and is by the said Crittenden unjustly detained from him; and the said affiant hath signed this affidavit.

EUGENE LEITENSDORFER.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at office, in the city of St. Louis, Missouri, to wit, at the District aforesaid, the day and year herein first written.

[SEAL.] AUSTIN DRAKE,
*Clerk.*

(No. 3, filed in the U. S. Land Office, Pueblo, Colorado, October 23d, 1872.)

IRVING W. STANTON,
*Register.*

Record, p. 745.

## Exhibit, 15.

DEED EROM EUGENE LEITENSDORFER TO SPRUCE M. BAIRD.

TERRITORY OF NEW MEXICO, }
*County of Taos.* }

Know all men by these presents, that I, Eugene Leitensdorfer, of Alberquerque, and Territory aforesaid, for and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, have this day bargained and sold, and by these presents do bargain and sell, transfer and convey unto Spruce M Baird, also of Alberquerque and Territory aforesaid, all my right, title and interest in and to a certain tract of land, originally granted by Manuel Armijo, Governor of the province of New Mexico, while the said land was under the dominion of Mexico, to Ceran St. Vrain and Cornelio Vigil, situate and being in the county of Taos and Territory of New Mexico, between and on the River Arkansas, the Rio de las Animas and the Rio Huerfano, my said interest being the one-sixth of said tract of land as conveyed to me by the said St. Vrain and Vigil, to have and to hold the said lands unto him, the said Baird and his heirs forever.

And I, the said Leitensdorfer, do by these presents bind myself forever to warrant and defend the title to the said lands unto the said Baird and his heirs against the claim of myself, my heirs, executors, administrators and assigns and against the claim of all persons claiming under me, but against the adverse claim of no other person.

In witness whereof I have hereunto set my hand and affixed my seal, using a scroll for a seal, this 4th day of January in the year of our Lord, one thousand, eight hundred and fifty-eight.

EUGENE LIETENSDORFER.

Signed, sealed and delivered in the presence of—

TERRITORY OF NEW MEXICO,
*County of Bernadillo,*
*Third Judicial District.*

Be it remembered, that on this fifth day of January, A. D. 1858, personally appeared before me, the undersigned, a private Justice of the Supreme Court of said Territory, and Judge of the Third Judicial District thereof, Eugene Leitensdorfer, who is personally known to me to be the real person who signed his name unto and executed the foregoing deed of conveyance, and who proposed to acknowledge the same, did acknowledge that he executed the same freely and voluntarily, for the intent and purposes herein expressed and set forth.

Given under my hand and seal the day and year first above written, at Albuquerque, in said District, County, and Territory.

KIRBY BENEDICT, [SEAL.]
*A Private Justice, &c.*

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TEERITORY OF NEW MEXICO,
*County of Taos.*

I hereby certify that the foregoing deed is a true copy, as found in the records of the Court of Probate of Taos County, N. M., pages 201 and 203.

In witness whereof, I have hereunto set my hand and affixed the seal of the Court this sixth day of May, A. D. 1871.

LEANDRO MARTINEZ,
*Clerk of the Probate Court,*
*Taos County, New Mexico.*

Filed in U. S. Land Office, Pueblo, Colorado, December 23, 1871.

IRWIN W. STANTON,
*Register.*

## Exhibit 16.

DEED FROM CERAN ST. VRAIN AND SPRUCE M. BAIRD TO ANN C. HOUGHTON.

Know all men by these presents that we, Ceran St. Vrain and Spruce M. Baird, of the Territory of New Mexico, present owners of the grant of land situate in the County of Taos, and known as the Purgatoire or Rio de las Animas Grant, made by the Mexican government to Ceran St. Vrain and Cornelio Virgil by deed of grant, bearing date the ninth day of December, A. D. 1843, and duly confirmed to the same and to their assigns and legal representatives by the Surveyor General of New Mexico on the twenty-first day of November, A. D. 1857, for and in consideration of one thousand dollars compensation for services to us rendered as attorney-at-law, in obtaining the confirmation of said grant by Joab Houghton, the value of which services are hereby acknowledged, and for other valuable consideration, we, by these presents, do give, grant, bargain and sell unto Anna Caroline Houghton, wife of the said Joab Houghton, and to her heirs and assigns forever, a certain part of said tract of land situate on the Huerfano River, which is within the limits of said grant and in the County of Taos aforesaid, and bounded and described as follows, to wit: Beginning at a point marked by a stake and stones on the west side of the valley of said river and about four miles below the foot of the canon through which said river passes, thence measuring on a course south twenty-five degrees west one hundred and sixty chains to a stake and stones for a monument on the west side of said valley, near the foot of the Mesa or table-land, said tract of land being bounded on the north and south by lines running due east and west through the two points above designated and extending from the brow of the table-lands on the east side of the river Huerfano to

the same on the west side of said river, and bounded on the east and west by the brow or edge of the said table-lands lying on the east and west side of said River Huerfano, said described tract intending to comprise two miles of the valley of said river, measuring in a straight line on the course hereinbefore mentioned:

To have and to hold the above granted premises to the said Anna Caroline Houghton, her heirs and assigns, to her and their use and behoof forever.

And we, the said owners of undivided interests in and to said grant of land known as the Purgatoire grant as aforesaid, do covenant with the said Anna Caroline Houghton for ourselves, our heirs, executors and administrators, and with her heirs and assigns, that we hold the above described property by virtue of the grant of the Mexican Government hereinbefore mentioned, and hereby convey all the right, title and interest we jointly hold in the premises herein described by virtue of said grant. And we will, and our heirs, executors and administrators shall warrant and defend the same to the said Anna Caroline Houghton, her heirs and assigns forever, against the lawful demands of all persons who may or shall claim under us or in our names. In witness whereof, we have hereunto set our hands and seals this fifth day of November, A. D. 1859.

CERAN ST. VRAIN,
S. M. BAIRD.

Sealed and delivered in the presence of,—
SAM'L ELLISON.

UNITED STATES OF AMERICA, }
*Territory of New Mexico.* }

Before the undersigned, clerk of the Supreme Court of the Territory of New Mexico, personally appeared Ceran St. Vrain, known to me to be the same person who signed

the foregoing deed of conveyance, and acknowledged that he signed, sealed and delivered the same on the date and year above written for the purposes and designs therein mentioned as his voluntary act and deed.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 5th day of November, A. D. 1859.

[SEAL.] SAM'L ELLISON, *Clerk.*

THE UNITED STATES OF AMERICA, }
*Territory of New Mexico.* }

Before me the undersigned Clerk of the Supreme Court of the Territory of New Mexico, personally appeared S. M. Baird, known to me to be the same person who signed the foregoing deed of conveyance and acknowledged that he signed, sealed and delivered the same on the day and year above written for the purposes and designs therein mentioned as his voluntary act and deed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 9th day of January, A. D. 1860.

[SEAL.] SAM'L ELLISON,
*Clerk.*

Fernando de Taos, New Mexico, y Octobre 19 de 1860. En este dia fué copiado el anterior documento en el libro de registros que se halla en los archivos de la Corte de Pruebas del Condado de Taos marcado con la letra B. Yestà copiado lieralmente en las paginas 84, 85, 86 y 87 de dicho libro.

PEDRO VALDEZ,
*Copiante.*

[ENDORSED.]

C. St. Vrain *et al.* to A. C. Houghton. Deed. Received the within instrument on the 7th day of September at 12

o'clock M., A. D. 1863, and recorded the same the same day in volume 1 on pages 196, 197, 198 and 199 of the records of Huerfano County.

Received fees for—

| | |
|---|---|
| Recording 9 folios | $2 00 |
| Certificate | 30 |
| Entering on Indices at 10 cents | 20 |
| | $2 50 |

GEO. S. SIMPSON,
*County Clerk and Recorder.*

Sept. 7th, A. D. 1863.

No. 3.

Filed in the U. S. Land Office, Pueblo, Colorado, by W. F. Stone, att'y, February 12, 1872.

IRVING W. STANTON,
*Register.*

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TERRITORY OF COLORADO, }
*Pueblo County.* }

I hereby certify that the within deed was filed for record at 50 minutes past 12 o'clock M., April 8th, A. D. 1869, and duly recorded in Vol. 2, pages 49, 50 and 51.

J D. MILLER,
*Recorder.*

$3.25 paid.

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## Exhibit 17.

DEED FROM ANN C. HOUGHTON TO WILLIAM CRAIG.

Know all men by these presents, that I, Ann Caroline Houghton, wife of Jaob Houghton, of the county of Santa Fe, of New Mexico, for and in consideration of the sum of one thousand dollars to me paid by Captain William Craig, of the United States Army, at present a resident of Fort Union, county of Mora and Territory aforesaid, the receipt whereof is hereby acknowledged, have by these presents bargained, sold, conveyed and forever quit-claimed unto the said William Craig and to his heirs and assigns forever, a certain piece or parcel of land situated on the Huefano river, in Huerfano county, in the Territory of Colorado, included in a grant of land made by the Mexican Government to Ceran St. Vrain and Cornelio Vigil, and confirmed to the same and to their assigns and legal representatives by the Surveyor General of the Territory of New Mexico September 17th, 1857. Said piece or parcel of land composes one-half mile on the valley of the said river Huerfano, and is the southern half mile of the two miles of said valley heretofore conveyed by a deed of Ceran St. Vrain and Spruce M. Baird to me, the said Ann Caroline Houghton, and is bounded as follows, to wit: On the north by lands belonging to the said Ann Caroline Houghton aforesaid, on the south by the lands of William Craig, and on the east and west by the highlands lying upon each side of the valley of said river Huerfano; together with the rights, privileges and appurtenances to the said tract of land in anywise appertaining or belonging. To have and to hold the said tract or parcel of land hereinbefore described comprising one-half mile of the valley of the river Huerfano aforesaid, to the same, more or less, with all the privileges thereunto belonging unto the said William Craig and to his heirs and

assigns forever against the lawful demands of all persons whatsoever claiming or to claim by, through or under me, my heirs, executors, administrators or assigns, by virtue of these presents.

In testimony whereof I have hereunto set my hand and seal this third day of June, A. D. 1863.

[L. S.] A. C. HOUGHTON.

Witnesses:

G. E. WEBB,
SAM. E. SHOEMAKER.

Know all men by these presents, that I, Joab Houghton, husband of the said Ann Caroline Houghton, who makes and executes the foregoing deed of conveyance, do by these presents confirm and sanction the same.

In testimony whereof I have hereunto set my hand and seal this third day of June, A. D. 1863.

[L. S.] J. HOUGHTON.

Executed and delivered in the presence of—

C. N. BRIANT,
M. RUDOLPH.

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TERRITORY OF NEW MEXICO, }
*County of Mora.* }

Be it remembered, that on this third day of June, A. D. 1863, personally come before the undersigned, a notary public, for the County of Mora, Territory aforesaid, Ann Coroline Houghton, wife of Joab Houghton, and the said Joab Houghton, whose names are signed to the foregoing deed of conveyance, both being personally known to me, and acknowledged that they signed and delivered the same for the purposes and designs therein mentioned.

In witness whereof I have hereunto signed my name and affixed my seal of office on the day and year above written.

[SEAL.] THOS. H. THOMPSON,
*Notary Public.*

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[ENDORSED.]

No. 6.

Filed in U. S. Land Office, Pueblo, Colorado, by W. F. Stone, Att'y, February 12, 1872.

IRVING W. STANTON,
*Register.*

Received the within instrument on the 7th day of September, A. D. 1863, at 12 o'clock M., and recorded the same on pages 215, 216, and 217, in Vol. I of the Records of Huerfano County.

Received fees—

| | |
|---|---|
| For recording 5½ folios | $1 30 |
| Certificate | 30 |
| Entering on indices, 10 c. | 20 |
| | $1 80 |

SEPT. 7TH, A. D. 1863.

GEO. S. SIMPSON,
*County Clerk and Recorder.*

AND

J. Houghton and Wife, in her own right, to Wm. Craig —Quit-claim Deed.

TERRITORY OF COLORADO, }
*Pueblo County.* }

I hereby certify that the within deed was filed for record at 10 minutes past 12 o'clock M., April 8th, A. D. 1869, and duly recorded in Vol. II, pages 36 and 37, Book of Records.

J. D. MILLER,
*Recorder.*

Fees, $2.75—Paid.

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## Exhibit 18.

DEED FROM ANNA C. HOUGHTON TO WILLIAM CRAIG.

Know all men by these presents that I, Ann Caroline Houghton, of the County of Mora, in the Territory of New Mexico, for and in consideration of three thousand dollars to me paid by William Craig, of the same County and Territory, the receipt whereof I do hereby acknowledge, do, by these presents, give, grant, bargain, sell and convey unto the said William Craig, his heirs and assigns, a certain parcel of land situate in the County of Huerfano, Territory of Colorado, on the Huerfano River, and comprising one and a half miles of said river and its valley, and bounded on the north by lands of Joseph B. Doyle, on the east and west by the high prairie, and on the south by lands of the said William Craig, being one and a half miles of said valley, conveyed to me, the said Ann Caroline Houghton, by Ceran St. Vrain and Spruce M. Baird, by deed bearing date the fifth day of November, A. D. 1859, which said deed is recorded in the book of deeds in the office of the Clerk of the Probate Court of the County of Taos, and reference to the same is hereby had for a more particular description of said land, together with all the privileges and appurte-

nances to the said lands in anywise appertaining and belonging. To have and to hold the above-granted premises to the said William Craig, his heirs and assigns, to his and their use and behoof forever. And I, the said Ann Caroline Houghton, for myself, my heirs, and executors, and administrators, do covenant with the said William Craig, his heirs and assigns, that I am lawfully seized in fee of the above-granted premises, that they are free from all incumbrance, that I have good right to sell and convey the same to the said William Craig, as aforesaid; and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said William Craig, his heirs and assigns forever against the lawful demands of all persons whatsoever claiming by, through, or under me, my heirs or assigns, or in my name.

In testimony whereof I have hereunto set my hand and seal this seventh day of August, A. D. 1863.

[L. S.] A. C. HOUGHTON.

Executed and delivered in the presence of witnesses:
THOS. N. THOMPSON.
GEORGE BERG.

---

TERRITORY OF NEW MEXICO, } *ss.*
*County of Mora.* }

Before me, the undersigned, Notary Public within and for the said county of Mora, personally appeared Ann Caroline Houghton, known to me to be the same person who signed the foregoing deed of conveyance, and acknowledged that she signed, sealed and delivered the same on the day and year above written, for the purposes and designs therein mentioned.

In testimony whereof, I have hereunto signed my name and affixed my notarial seal, this 7th day of August, A. D. 1863.

[SEAL.] THOS. H. THOMPSON,
*Notary Public.*

Know all men by these presents that I, Joab Houghton, husband of Ann Caroline Houghton, who executed the foregoing deed of conveyance for property held in her own right, do hereby assent to and confirm the same, and assume for myself, my heirs and assigns, the covenants and and obligations therein contained.

In testimony whereof, I have hereunto set my hand and seal, this 12th day of August, A. D. 1863.

[L. S.] J. HOUGHTON.

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TERRITORY OF NEW MEXICO, }
*County of Santa Fe.* }

Before me, the undersigned, Clerk of the Supreme Court of New Mexico, personally appeared Joab Houghton, known to me to be the same person who signed the foregoing instrument of writing, and acknowledged that he signed, sealed and delivered the same for the purposes and designs therein mentioned, and on the day therein stated.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, this 12th day of August, A. D. 1863.

[SEAL.] SAMUEL ELLISON.
*Clerk.*

[ENDORSED.—No. 7.]

Filed in the U. S. Land Office, Pueblo, Colorado, by W. F. Stone, Attorney, February 12, 1872.

IRVING W. STANTON,
*Register.*

Received the within instrument on the 7th day of September, A. D. 1863, at 12 o'clock M., and recorded the same on pages 211, 212, 213 and 214, in vol. 1 of the records of Huerfano County.

Received fees—

| | |
|---|---|
| For recording 6½ folios | $1 50 |
| Certificate | 30 |
| Entering on Indices at 10 | 20 |
| | $2 00 |

GEO. S. SIMPSON,
*County Clerk and Recorder.*

Sept. 7th, 1863.

and

*A. C. Houghton to William Craig.—Deed.*

TERRITORY OF COLORADO, }
*Pueblo County.* }

I hereby certify that the within deed was filed for record at five minutes past 12 o'clock M., April 8th, A. D. 1869, and duly recorded in vol. 2, pages 34, 35 and 36, Book of Records.

J. D. MILLER,
*Recorder.*

Fees $3.00. Paid.

## Exhibit, 19.

POWER OF ATTORNEY FROM CERAN ST. VRAIN AND SPRUCE M. BAIRD *et al.* TO JOAB HOUGHTON.

Know all men by these presents that we Ceran St. Vrain, Spruce M. Baird, Robert P. Kelly and Luis H. Baca, of the Territory of New Mexico, joint owners of a certain tract of land situated in the County of Taos, granted by the late Mexican Government to Ceran St. Vrain and Cornelio Vigil and known as the "Purgatoire Grant," have constituted and appointed and by these presents do constitute and appoint Joab Houghton, of the County of Santa Fe and Territory aforesaid, our true and lawful attorney and agent for the purposes following, to wit: We hereby authorize our said attorney and agent to settle and convey to Joseph B. Doyle for the sum of four hundred dollars, two miles in length of the Valley of Huerfano river lying north of the portion of said Valley conveyed by us to Ann Caroline Houghton, and in our name as attorney to execute to said Doyle a deed for the same conveying our right, title and interest. We further empower our said agent and attorney to sell and convey to persons who enter into obligation to settle on the same alternate sections of land to comprise one hundred and sixty acres, in the portion of the Valley of the River Huerfano north of the foot of the Canon through which said river runs, all of said Valley not otherwise disposed of from the foot of said Canon to the mouth of said river on the Arkansas river; said alternate sections to be sold for not less than one hundred dollars to actual settlers. All moneys received by our said agent and attorney shall be remitted to Ceran St. Vrain, at the town of Mora, New Mexico, or placed in deposit at the house of St. James & Co., at Denver City, Kansas Territory, subject to his

order, our said agent retaining for his services out of the proceeds of each sale made by him twenty dollars.

Hereby ratifying and confirming all our said attorney and agent may lawfully do or cause to be done in the premises.

In testimony whereof we have hereunto set our hands and seals this fifth day of November, A. D. 1859.

[L. S.] CERAN ST. VRAIN,
[L. S.] S. M. BAIRD.

Sealed and delivered in the presence of—
SAM'L ELLISON.

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UNITED STATES OF AMERICA, }
*Territory of New Mexico.* }

Before the undersigned, clerk of the Supreme Court of the Territory of New Mexico, personally appeared Ceran St. Vrain, known to me to be the same person who signed the foregoing power of attorney, and acknowledged that he signed, sealed and delivered the same, on the day and year above written for the purposes and designs therein mentioned.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 5th day of November, A. D. 1859.

[SEAL.] SAM'L ELLISON,
*Clerk.*

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UNITED STATES OF AMERICA, }
*Territory of New Mexico.* }

Before the undersigned clerk of the Supreme Court of the Territory of New Mexico, personally appeared S. M. Baird, known to me to be the same person who signed the foregoing power of attorney, and acknowledged that he

signed, sealed and delivered the same on the same day and year above written for the purposes and designs therein mentioned.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 9th day of November, A. D. 1860.

[SEAL.] SAM'L ELLISON,
*Clerk.*

Este dia 19 de Oct., 1860, fue copiado el anterior documento power of attorney en el libro de Registros que para en el Archivo del Condado de Taos, Territorio de Nuevo Mexico, Macardo con la letra B y dicho documento se palla en los page 82, 84 y 85 de dicho libro y el cual fue copiado literalmente por mi.

PEDRO VALDEZ.

NOTE.—Another power of att'y from Ceran St. Vrain to Joab Houghton to represent him and all his interest in the Las Animas or Purgatoire Grant with the power to sell to actual settlers on any part of the grant.

Dated February 23d, 1859, recorded in the office of the Probate Court at Taos, book "A," pages 205 and 206.

April 13th, 1859.

[ENDORSED.]

Filed in the U. S. Land Office at Pueblo, Colorado, February 15, 1872.

IRWIN W. STANTON,
*Register.*

## Exhibit 20.

POWER OF ATTORNEY FROM CERAN ST. VRAIN TO JOAB HOUGHTON.

Know all men by these presents, that I, Ceran St. Vrain, of County of Taos and Territory of New Mexico, have constituted and appointed, and by these presents do constitute and appoint Joab Houghton of the County of Santa Fe, territory aforesaid, my true and lawful agent and attorney for me, and in my name and stead to act in all matters pertaining to my interest in a certain grant of land made by deed of grant of the late Mexican Government to Cornelio Vigil and Ceran St. Vrain, bearing date the second day of January, A. D. 1844, and situated on the river Arkansas, which forms the northern boundary of said lands and including the branches of said river, known as the Purgatoire, Pisipa and Huerfano, and their tributaries, hereby authorizing my said agent or attorney to designate to persons desiring to settle on said lands such locations as he may think proper and under such restrictions and conditions as he may prescribe. Hereby ratifying and confirming all my said attorney may lawfully do or cause to be done in the premises.

In testimony whereof I have hereunto set my hand and seal this 23d day of February, A. D. 1859.

CERAN ST. VRAIN. [SEAL.]

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TERRITORY OF NEW MEXICO,
*County of Taos.*

Be it remembered that on this twenty-third day of February, in the year of our Lord one thousand eight hundred and fifty-nine, before me, Jas. Barry, Clerk of the U. S. District Court for the Second Judicial District of New Mex-

ico, personally appeared Ceran St. Vrain to me well known to be the person who executed the foregoing letter or power of attorney, and acknowledged the same to be his voluntary act and deed.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at office in Fernando de Taos, the day and year above written.

JAMES BARRY,
*Clerk.*

Copiado el anterior poder de Ceran St. Vrain à Joab Houghton literalmente permie el abajo firmado Secretario de el Condado de Taos 13 de Abril, 1859.

PEDRO VALDEZ,
*Registrado.*

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TERRITORIO DE NUEVO MEXICO,
CONDADO DE TAOS. }

Certifico que el presente es una verdadera yexacta copia sacada de un original del libro a pagina 205 y 206.

En testimonio de lo cual he puesto aqui mi nombre y el sello de la Corte de Pruebas en mi oficina en Taos hoy dia 22 del mus de Abril, A. D. 1871.

LEANDRO MARTINEZ,
*Escribano Del Condado.*

(Copia).

[ENDORSED.]

Filed in the U. S. Land Office at Pueblo, Colorado, Feb 15, 1872.

IRWIN W. STANTON,
*Register.*

## Exhibit 21.

DEPOSITION OF JOAB HOUGHTON AS TO SALE OF A PORTION OF THE HUERFANO VALLEY TO WILLIAM KRONIG.

TERRITORY OF NEW MEXICO, } ss:
*County of Santa Fe,* }

The undersigned, Joab Houghton, having been sworn according to law, deposes and says: That by the power and authority in him vested by virtue of a certain power of attorney to him made and executed on the fifth day of November, A. D. 1859, by Ceran St. Vrain and Spruce M. Baird, owners and proprietors of the grant known as the Rio de Las Animas or Purgatoire Grant, which said power of attorney is recorded in the book of record of deeds in the office of the Clerk of the Probate Court of the County of Taos and Territory of New Mexico, pages 82, 83, 84, and 85, he did sell and convey to William Kronig, of the County of Mora and Territory of New Mexico, by deed of conveyance dated some date of the year 1860, a certain tract of land situated in the Territory of New Mexico (now Colorado), and lying on the river Huerfano, a branch of the Arkansas, included in the grant of land known as the Las Animas or Purgatoire Grant, made by the late Mexican Government to Ceran St. Vrain and Cornelio Vigil; that the tract of land thus conveyed is known and designated in a plat of survey of the valley of the said Huerfano river, made by the said Joab Houghton in the year 1860, as

half-mile sections of said valley, numbered 14 and 15, and contain one mile in length of the same, following the general course thereof from the south in northerly direction, and bounded on the north by section number 16, and on the south by section number13, as designated in the said plat of surveys ; together with the privilege of pasturage, water, wood, timber, and stone upon all parts of said grant of land not within the valleys of the streams or other parts of the same which may not be hereafter conveyed by the owners for cultivation or other purposes.

Affiant makes this declaration as evidence of the title of the said William Kronig to the tract of land herein described, in the event that the original deed or deeds, made by this affiant to the said William Kronig as aforesaid, should not be found, the same being said to be lost.

J. HOUGHTON.

Sworn to and subscribed before the undersigned, Samuel Ellison, Clerk of the United States District Court of the First Judicial District of the Territory of New Mexico, this seventeenth day of June, A. D., 1869.

Witness my hand and the seal of said Court.

SAM'L ELLISON,

[SEAL ] *Clerk 1st Jud. Dist. Court, N M.*

5-ct. Int. Revenue Stamp.

## Exhibit 22.

DEED FROM S. M. BAIRD *et al.*, BY J. HOUGHTON, ATTORNEY, TO NORTON W. WELTON.

Know all men by these presents, that I, Joab Houghton, of the County of Santa Fe, Territory of New Mexico, by virtue of the power and authority in me vested by a certain power of Attorney to me, made and executed by Ceran St. Vrain, Spruce M. Baird, Luis M. Baca and Robert P. Kelly, present owners of a grant of land situated in the County of Taos, in said Territory of New Mexico, and known as the Purgatoire or Las Animas Grant, made by Mexican Government to Ceran St. Vrain and Cornelio Vigil by deed of grant, bearing date the ninth day of December. A. D. 1843, and duly confirmed by the Surveyor General, of New Mexico, on the twenty first day of November, A. D. 1859, (said power of Attorney, bearing date the fifth day of November, A. D. 1859,) for and in consideration of the sum of two hundred dollars to me in hand paid by Norton W. Welton, of the County of Taos, and Territory of New Mexico, the receipt whereof is acknowledged, and for the consideration that the said Welton shall by or before the first day of November next, occupy and settle and improve the piece or parcel of land hereby conveyed, granted, bargained, sold, conveyed and quit-claimed, and by these presents do grant, bargain, sell, convey and quit-claim unto the said Norton W. Welton his heirs, and assigns forever that certain portion of the aforesaid grant of land situated on the Rio Huerfano, and designated as Section twelve (12). comprising one-half mile of the Valley of the said Rio Huerfano, measured from southwest to northeast in a straight line on the west side of said river, and bounded on the east and west by the first hills lying to the east and west of said Valley, also, common right to the waters of said Rio Huerfano, to the pasture, wood, timber and stone

on the plains or highlands not included in the irrigable or cultivatable lands of said grant of lands, not included in any portion now conveyed or that may be hereafter conveyed. And I do hereby covenant and agree to warrant and defend the same against the lawful claims of all persons claiming by, through or under me, or the owners of said grant of land hereinbefore mentioned.

Given under my hand and seal at the town of Denver, in the County of Montana, Territory of Kansas, this twenty-first day of April, A. D. 1860.

J. HOUGHTON,
*Attorney.*

In the presence of—
J. D. BAKER, JR.,
I. F. BATTAILE.

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ARRAPAHOE COUNTY, } *ss:*
*Kansas Territory.* }

On this 24th day of April, 1860, before me a Notary Public in and for said County, personally came J. Houghton, attorney, whose name is affixed to the above instrument as grantor and acknowledged the same to be his voluntary act and deed.

Witness my hand and seal.

A. JACOBS,
[NOTARIAL SEAL.] *Notary Public.*

Certificio que el presente enregistracio en el libro de regestro del Condado de Mora Territorio de Nuevo Mexico en paginas 23–24–25.

TRINIDAD LOPEZ,
[SEAL.] *Secretario del Jues de Pruevas.*

[ENDORSED.]

Recorded the within instrument at 3 o'clock p. m., this 10th day of October, A. D. 1864, on pages 33, 34 and 35 of Vol. 2 of the Records of Huesfano County.

| | |
|---|---|
| Received fees for recording 5 folios | $1 50 |
| Indices | 20 |
| Certificates | 30 |
| | $2 00 |

GEO. S. SIMPSON,
*Recorder.*
By R. SKERRATT,
*Deputy.*

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## Exhibit 23.

DEED FROM S. M. BAIRD ET AL., BY J. HOUGHTON, ATT'Y, TO JOSEPH B. DOYLE.

Know all men by these presents, that I, Joab Houghton, by virtue of the power and authority in me vested by a certain power of attorney, to me made and executed by Ceran St. Vrain, Spruce M. Baird, and others, bearing date the fifth day of November, A. D. 1859, and recorded in the Book of Record of Deeds in the office of the Clerk of the Probate Court within and for the County of Taos, in the Territory of New Mexico, for and in consideration of the sum of five hundred dollars to me in hand paid by Joseph B. Doyle, of the County of Mora, in said Territory of New Mexico, the receipt whereof is hereby acknowledged, have by these presents bargained, sold, conveyed, and forever quit-claimed unto the said Joseph B. Doyle,

and to his heirs and assigns, a certain piece or parcel of land situated on the Huerfano River, in the County of Mora and Territory of New Mexico, and included in a grant of land known as the Rio de Las Animas Grant, made by the Mexican Government to Ceran St. Vrain and Cornelio Vigil, and confirmed by the same, and to their assigns and legal representatives, by the Surveyor General of New Mexico, September 19th, 1857, and by act of Congress of the United States, approved June 21, 1860. Said piece or parcel of land comprises two and a half miles of the valley of the said Rio Huerfano, and is bounded on the east and west by the highlands lying on the east and west side of said river, on the north by Section No. 2, according to a survey made of said valley by the said Joab Houghton, and on the south by lands of Ann Caroline Houghton, the north and south lines of said land crossing the said valley in a due east and west course. Together with all the privileges in common of pasturage, water, wood, timber, and stone, upon all parts of said tracts of land not within the valleys of the streams or other parts of the same not specially conveyed by the owners for cultivation or improvement. And I do hereby covenant, by virtue of the power and authority in me vested as aforesaid, to warrant and defend the same against the lawful claims of all persons claiming by, through, or under me, or the owners of the grant aforesaid, and no others.

In witness whereof I have hereunto set my hand and seal as attorney, aforesaid, this first day of August, 1860.

[L. S.] J. HOUGHTON,
*Attorney.*

Executed and delivered in the presence of:
J. M. GEDDING.
SAM'L ELLISON.

UNITED STATES OF AMERICA, }
*Territory of New Mexico.* }

Before me, the undersigned clerk of the United States District Court for the first judicial district for the Territory aforesaid, personally appeared J. Houghton, to me known to be the same person who signed the above and foregoing deed of conveyance, and acknowledged that he executed the same on the day and year therein written, for the purposes and designs therein set forth as his voluntary act and deed.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, in Santa Fé, this 28th of April, 1861.

[SEAL.] SAMUEL ELLISON,
*Clerk.*

Certifico que el presente documento ha sido fiel y legalmente enregistrado en el libro de registros del Condado de Mora en pajinas 38 y 39.

In testimonio de lo cual pongo mi mano y el Sello del Condado ariba dho. En Santa Gertrudis de Mora hoy 17 de Junio, A. D. 1861.

[SEAL.] TRINIDAD LOPEZ,
*Escribano.*

Territory of Colorado, Huerfano County.

I hereby certify that I have truly and lawfully recorded the within deed in a Book of "Miscellaneous Records of Huerfano County," Vol., pages 163, 164, and 165. In testimony whereof I have hereunto set my hand and affixed the seal of said County, this 28th day of June, A. D. one thousand eight hundred and sixty-two.

[SEAL.] GEO. S. SIMPSON,
*Clerk & Recorder.*

[ENDORSED.]

Received fees for recording the within deed.

| | |
|---|---|
| 6 ¼ Folios..... | 2.50 |
| Certificate... .... | 30 |
| | $2.80 |

and

No. 3.

Filed in the U. S. Land Office, Pueblo, Colorado, January 6, 1873.

IRWIN W. STANTON,
*Register.*

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## Exhibit 24.

DEED FROM SPRUCE M. BAIRD TO SAMUEL B. WATROUS AND WILLIAM B. TIPTON.

Know all men by these presents, that I, Spruce M. Baird, of the County of Bernalillo, in the Territory of New Mexico, for and in consideration of the sum of one thousand dollars to me paid by Samuel B. Watrous and William B. Tipton, of the County of Mora, in the Territory aforesaid, the receipt of which is hereby acknowledged, have by these presents sold, quit claimed and assigned unto the said Watrous and Tipton, their heirs and assigns forever, a certain piece or parcel of land lying on the Huerfano River, in the Territory of Colorado, included in the grant of land made by the Mexican

Government to Ceran St. Vrain and Cornelius Vigil, by deed of grant bearing date the 9th day of December, A. D. 1843, duly confirmed by the Surveyor General of New Mexico November 2d, 1857, and by act of Congress of the United States, approved June 22, 1860, to the said Ceran St. Vrain and to the legal representatives of Cornelio Vigil, deceased, and know as the Purgatoire or Las Animas Grant, situated on the River Arkansas and its tributaries, Purgatoire or Rio de Las Animas Tunipa Apishapa and Huerfano, with their tributaries. Of which grant I, the said Spruce M. Baird, am owner of an undivided one sixth part by virtue of a deed of conveyance from Eugene Leitensdorfer, bearing date the 4th day of January, A. D. 1858, to me executed and recorded in the Book of record of deeds in the office of the Judge of Probate of the County of Taos, Territory aforesaid, pages 201 and 202. The said premises hereby conveyed, comprising one mile in length of the valley of the said Huerfano River, and including sections Nos. 12 and 13, according to a survey and map made of said valley by J. Houghton, general agent for said grant, now in the possession of the said Houghton, and bounded on the north by lands of William Kronig, on the south by lands of William Welton ; together with the privilege in common of pasturage, water, wood, timber and stone upon all parts of said grant not situated in the valley of the streams especially granted and conveyed by the owners for cultivation, improvement or other use, and all other rights and appur-

tenances to the said lands appertaining and belonging. To have and to hold the aforesaid premises unto the said Samuel B. Watrous and William B. Tipton, their heirs and assigns forever to their sole use and benefit, so that neither I, my heirs and assigns or other owners of said grant, their heirs and assigns, or any person or persons claiming under me or them, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises, or appurtenances or any part or parcel thereof forever. Conditioned, however, that, in addition to the consideration hereinbefore mentioned, the said Samuel B. Watrous and Wm. B. Tipton are hereby held, bound to settle upon and improve the said premises or cause the same to be done within one year from the date hereof, otherwise to forfeit the said lands to the owners and this deed to be null and void.

In witness whereof I have hereunto set my hand and seal this twentieth day of March, A. D. 1862.

S. M. BAIRD. [SEAL.]

Signed, sealed and delivered in presence of—
WM. W. H. ENRIE or WM. W. HENRIE,
J. M. WELLS.

[ENDORSED.]

"Marked A. Spruce M. Baird to S. B. Watrous & Wm. B. Tipton. Quit Claim deed.

I hereby certify that I received the within deed on the 30th day of July, A. D. 1863, and recorded the same in the Book of Records of Huerfano County, Colorado Territory, in Vol. 1, pages 193, 194, & 195.

| | |
|---|---|
| Fees 5 folios & 3-4 - | 1.35 |
| Entering in indexes - | 20 |
| Certificate of record - | 30 |
| | 1.85 |

GEO. S. SIMPSON,
*County Clerk & Recorder.*

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**Exhibit 25.**

Item from abstract of title to part of the Vigil and St. Vrain Grant, certified to by the Clerk of Pueblo County, Colorado, under the seal of said court.

*Ceran St. Vrain, Spruce M. Baird et al. by J. Houghton, Attorney, to William Craig.*

Deed, consider. $100.00; dated July 1, 1860; acknowledged September 29, 1860; recorded August 9, 1871. Conveys one mile of the valley of Huerfano, known on the map or survey of Houghton as Section 6.

An endorsement attached, dated June 10th, 1869, signed by Ceran St. Vrain and S. M. Baird, sets forth that they thereby ratify and confirm the same.

## Exhibit 26.

Abstract showing transfer of title from S. M. Baird to Thomas Leitensdorfer.

*Spruce M. Baird to Eugene Leitensdorfer.*

Deed dated February 24, 1860; signed, sealed; no acknowledgment; filed in Las Animas County for record, June 1st, 1872; U. S. Record, p. 764.

SPRUCE M. BAIRD to EUGENE LEITENSDORFER. } Power of Attorney Feb. 24th, 1860. Signed and Sealed.

Authorizes attorney to take possession of and sell "all messages, lands, tenements, hereditaments and real estate" in Missouri to New Mexico, to which he (Baird) may be entitled, at such price and time as he may deem mete, and until the sale thereof, to let and demise the same; to demand and receive all sums of money due and owing said Baird, and to take all lawful means for the recovery thereof, "ratifying, allowing, and holding for firm and effectual all and whatsoever my said attorney shall lawfully do in and about the premises by virtue hereof."

Rec., p. 764.

*Eugene Leitensdorfer for himself and as Attorney in fact for S. M. Baird, to Thomas Leitensdorfer.*

Deed dated Dec. 10, 1861; consider. $1200 "Have bargained, sold, granted and conveyed * * all the right, title, interest and claim to a tract of land, giving boundaries of the Las Animas Grant. Signed, Eugene Leitensdorfer (seal) for himself and attorney in fact for S. M. Baird.

Acknowledged Oct. 1863; recorded in Huerfano Co., Dec. 12, 1863; record p. 755.

*Eugene Leitensdorfer and S. M. Baird, by his Attorney, Eugene Leitensdorfer to Thomas Leitensdorfer.*

Deed, May 22, 1872; consider. $500 "Have bargained, sold, granted and conveyed * * all the right, title, interest and claim to a tract of land in the Territory of Colorado, bounded as follows, giving the Las Animas Grant boundaries. Signed, sealed, acknowledged June 1, 1872. R. in Las Animas Co., June 1, 1872, vol. 4, p. 110; record p. 763.

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## Exhibit 27.

Showing to what lands Thomas Leitensdorfer claimed title before the Register and Receiver.

W. ½ Sec. 13, E. ½ Sec. 28, E. ½ Sec. 32, and Sec's 22, 23, 24, 27 and 33, in T. 32, S. R. 63.

W. ½ Sec. 25, W. ½ Sec. 36 and Sec's 5, 7, 8, 18, 19, 20, 21, 22, 23, 26, 27, 34and 35, in T. 33, S., R. 63, W.

Sec's 13 and 24, in T. 33, S., R. 64, W.

W. ½ Sec. 1 and Sec's 2 and 3, in T. 34, S., R. 63, W.

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## Exhibit 28.

Abstract showing transfers to the United States of a portions of the lands claimed by Thomas Leitensdorfer before the Register and Receiver.

*Thomas Leitensdorfer to the United States.*

Deed dated, May 26, 1873; N. W. ¼, Sec. 33, T. 32, R. 63 W.; S. E. ¼ S. 28, T. 32, R. 63 W., N.

E. ¼ of N. E. ¼ S. 33, T. 32, R. 63 W. Signed, sealed, acknowledged May 26, 1873.

Filed in U. S. Land Office, Pueblo, May 26, 1873.

MS. Record, p. 853.

*Thomas Leitensdorfer to the United State.*

Deed dated, May 28, 1873. E. ½ of N. E. ¼, 32, 28, T. T. 32, R. 63 W.; S. ½ of N. E. ¼ of S. S. 32, R. 63 W.; S. E. ¼, S. 32, T. 32, R. 63 W.; N. E. ¼ of S. W. ¼, S. 27, T. 32, R. 63 W.; S. W. ¼ of N. W. ¼, S. 27, T. 32, R. 63 W.; W. ½ of N. E. ¼ of S. 32, T. 32, R. 63 W. Signed, no seal, acknowledged May 28, 1873.

MS. Record, p. 855.

*Thomas Leitensdorfer to the United States.*

Deed dated, May 28, 1873. N. W. ¼, S. 27, N. ½ of N. E. ¼ and W. ½ of S. W. ¼, S. 27, the E. ½ of S. 28 and W. ½ of S. W. ¼, and N. W. ¼ of S. 33, T. 32, S. R. 63, W.; Secs. 26, 27, 34, 35 and W. ½ of Secs. 25 and 36, T. 33, S. R. 63 W.

Signed, sealed, acknowledged May 28, 1873.

Filed in U. S. Land Office at Pueblo, May 28, 1873.

MS. Record, p. 856.

*Thomas Leitensdorfer to the United States.*

Deed dated, June 16, 1873. E. ½ S. 13, T. 33 S., R. 64 W., and W.; ½ S. 18, T. 33 S., R. 63 W.

Signed, sealed, acknowledged June 16, 1873.

Filed in U. S. Land Office, Pueblo, December 22, 1873.

M. S. Record, p. 857.

## Exhibit 29.

DEED FROM THOMAS LEITENSDORFER BY EUGENE LEITENSDORFER, ATT'Y, CONVEYING ALL HIS INTEREST IN THE VIGIL AND ST. VRAIN GRANT TO JOHN HALLUM.

This deed, made and entered into on this first day of July, in the year of our Lord one thousand eight hundred and seventy-three, by and between Thomas Leitensdorfer of the County of Las Animas and Territory of Colorado, party of the first part, and Jno. Hallum of the city and county of St. Louis in the State of Missouri, party of the second part.

Witnesseth, that the said party of the first part for and in consideration of the sum of fifteen thousand dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath given, granted, bargained, aliened, sold and conveyed, and by these presents doth bargain, grant, alien, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title, claim and interest of any nature whatsoever, which I now own as a derivative claimant under Ceran St. Vrain and Cornelio Vigil to a grant of land made by the Mexican Government to the said St. Vrain and Vigil, which is better known as Las Animas grant situated in the territory of Colorado and lying south of the Arkansas river, reference being here had to the record of said grant, and all other public records connected with the same for more particular certainty. To have and to hold unto the said John Hallum, his heirs and assigns forever, and it is hereby understood and agreed that my claim to an interest in said grant under an act of Congress in reference to said grant and derivative claimants of same shall enure to the benefit of the said party of the second part and his heirs and assigns, and that the said party of the second part, his heirs and assigns, are authorized and fully empowered to prosecute this claim in the name of the said

party of the first part, or to substitute himself or themselves in lieu of the said party of the first part at their own or his own option, and it is further understood and agreed that this conveyance is made by the said party of the first part, by and through his duly authorized agent and attorney, Eugene Leitensdorfer of St. Louis, Missouri.

In testimony whereof I have hereunto set my hand and affixed my seal this the day and year first above written.

THOMAS LIETENSDORFER. [SEAL.]
By EUGENE LEITENSDORFER, [SEAL]
*Agent and Attorney in Fact.*

STATE OF MISSOURI, } *ss.*
*County of St. Louis.* }

Be it remembered that on this 9th day of July, A. D. 1873, before me, the undersigned, a notary within and for the county and State last aforesaid, personally came and appeared Eugene Leitensdorfer, agent and attorney in fact for Thomas Leitensdorfer, who is personally known to me to be the same person whose name is subscribed (as said attorney in fact for his principal) to the foregoing instrument of writing, to which his said principal is a party, and acknowledged the same to be the act and deed of the said Eugene Leitensdorfer, and acknowledged the same to be the act and deed of his said principal Thomas Leitensdorfer, executed for the purposes therein mentioned. And the said attorney in fact declared the said principal to be at this time single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office, in St. Louis, Missouri, the day and year first above written.

{ Seal of Las Animas } JAS. H. PURDY,
{ County, Col. } *Notary Public,*
*St. Louis County, State of Missouri.*

TERRITORY OF COLORADO, } ss.
*County of Las Animas.* }

I here certify that the above and foregoing is a true copy of the original instrument of writing filed in the County Clerk's Office for record at 12 M. on the 21st day of July A. D. 1873.

JESUS MA. GARCIA,
*Clerk and Recorder.*
By J. R. BROOKING,
*Deputy.*

STATE OF COLORADO, } ss.
*County of Las Animas.* }

I certify that the above and foregoing is a true copy of the recorded deed from Thos. Leitensdorfer to John Hallum, as the same appears of record in Vol. 4, page 526, Land Records of Las Animas County, Colorado. Witness my hand and the seal of said County the fourth day of August, A. D. 1885.

[SEAL.]

JESUS MA. GARCIA,
*County Clerk and Recorder.*
By PEDRO C. CHACON,
*Deputy.*

[ENDORSED.]

STATE OF COLORADO, } ss.
*County of Peublo,* }

I hereby certify that this instrument was filed for record at 3:35 o'clock P. M. Aug. 6, 1885, and duly recorded on book 49, page 161.

J. S. STEWART,
*Recorder.*
W. J. WOODSWORTH,
*Deputy.*

No. 19,132. Fees, $1.95, pd.

## Exhibit 30.

DEED FROM THOMAS LEITENSDORFER TO JOHN HALLUM RATIFYING AND CONFIRMING THE ABOVE.

This indenture, made and entered into on this the twenty-sixth day of July, in the year of our Lord, one thousand eight hundred and seventy-three, by and between Thomas Leitensdorfer, of the County of Las Animas, in the Territory of Colorado, party of the first part, and John Hallum, of the City and County of St. Louis, in the State of Missouri, witnesseth that whereas my duly authorized and constituted attorney in fact, Eugene Leitensdorfer, of St. Louis, Missouri, did, in June or July, eighteen hundred and seventy-three, in my name, place and stead, and for me sell, transfer and convey to the said John Hallum for a valuable and *bona fide* consideration all of my right, title, claim, and interest of every nature whatsoever in the grant commonly known as the Las Animas Grant, made by the Government of Mexico, or duly constituted authorities thereunder, to Cornelio Vigil and Ceran St. Vrain, to lands situated in the southern part of the Territory of Colorado, said grant being made before the acquisition of said Territory by the United States, reference being here made to the public records and documents concerning the same for a more particular minute description of the same. Now, therefore, in consideration of the premises aforesaid, know all men that the said Thomas Leitensdorfer do hereby adopt, ratify and in all things confirm the said sale and conveyance heretofore made by my agent and duly constituted attorney to the said John Hallum as aforesaid.

In witness whereof I have hereunto set my hand and affixed my seal the day and year first above written.

[SEAL.] THOMAS LEITENSDORFER.

TERRITORY OF COLORADO, } ss.
*County of Pueblo.* }

Be it remembered that on this fourth day of August, A. D. 1873, at my office in the town of Pueblo, in the county and territory aforesaid, personally came Thomas Leitensdorfer, to me well known to be the identical person who executed the foregoing instrument of writing, and acknowledged that he signed and sealed the same of his own free will for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and official seal, this 4th day of August, A. D. 1873.

[NOTARY PUBLIC SEAL.] WILLOW F. STONE,
*Notary Public.*

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TERRITORY OF COLORADO, } ss.
*County of Las Animas.* }

I hereby certify that the above and foregoing is a true copy of the original instrument of writing filed in my office for record at 8 a. m., September 1st, A. D. 1823, and duly recorded.

JESUS MA. GARCIA,
*Recorder.*

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STATE OF COLORADO, } ss.
*County of Las Animas.* }

The foregoing I certify to be a true copy of the deed which appears of record in my office on page 544 of vol. 4, Land Records of Las Animas County, Colorado.

Witness my hand and the seal of said county, the 4th day of August, A. D. 1885.

[COUNTY SEAL.] JESUS MA. GARCIA,
*County Clerk and Recorder.*
By PEDRO C. CHACON,
*Deputy.*

## Exhibit, 31.

DEED DATED DEC. 18, 1880, FROM THOMAS LEITENSDORFER TO JOSEPHINE FARNSWORTH CONVEYING ALL HIS INTEREST IN THE VIGIL AND ST. VRAIN GRANT.

This deed, made this 18th day of December, A. D. 1880. by and between Thomas Leitensdorfer, of the county of Las Animas, State of Colorado, party of the first part, and Josephine Farnsworth, of the city of St. Louis, and State of Missouri, party of the second part, witnesseth: That the said party of the first part, in consideration of the care and education of the children of the party of the first part by said party of the second part, and in consideration of money loaned by said party of the second part to said party of the first part, which, after final settlement, on the 18th day of December, 1880, is still unpaid and due, the receipt of which payment of said sum due on settlement is hereby acknowledged in consideration of the hereinafter conveyance he, the said party of the first part, hath given, granted, aliened, transferred, conveyed and quit-claimed, and by these presents doth give, grant, alien, transfer, convey and quit-claim, unto said party of the second part, and to her heirs and assigns forever, all the right, title, claim and interest, which the said party of the first part acquired as derivative claimant under Cornelio Vigil and Ceran St. Vrain, to a grant of land made by Manuel Armijo, Governor of the province of New Mexico, in the year 1843, which grant is better known as the Vigil and St. Vrain, or Las Animas grant, situate and lying in the State of Colorado, county of Las Animas, of said State, reference being had to the records of said State of Colorado, and more particularly to the record of the claim and title of the party of the first part in the said Vigil and St. Vrain, or Las Animas grant. To have and to hold the said tract or parcel of land as hereinafter described unto her and her heirs and assigns forever.

In testimony whereof, I have hereunto set my hand and seal the day and year first above mentioned.

[SEAL] THOMAS LEITENSDORFER.

STATE OF MISSOURI, } ss.
*City of St. Louis.* }

Be it remembered that on this 18th day of December, 1880, before the undersigned, a Notary Public within and for the city and State aforesaid, came Thomas Leitensdorfer, personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and he acknowledged the same to be his free act and deed for the purposes and uses therein mentioned. In testimony whereof I have hereunto set my hand and affixed my official seal this 18th day of December, 1880. Term expires April 30th, 1881.

[SEAL.] ENRIQUE PARMER,
*Notary Public.*

STATE OF MISSOURI, } ss.
*City of St. Louis.* }

Be it remembered that I, Charles T. Vogel, Clerk of the Circuit Court, City of St. Louis, the same being a court of record, of said city and State, hereby certify that Enrique Parmer, the person certifying the acknowledgment of Thomas Leitensdorfer, the grantor in the foregoing and attached deed, was, on the 18th day of December, 1880, a duly-commissioned, qualified and acting Notary Public within and for the City of St. Louis, in the State aforesaid; that said Parmer resides in said City of St. Louis, and so resided on December 18th, 1880; that he had at said date full authority by the laws of said State of Missouri, to take and certify such acknowledgement, and that the signature of said officer to said certificate of acknowledgment is the

true signature of said Enrique Parmer, Notary Public as aforesaid.

Given under my hand and the seal of our said Circuit Court this 24th day of May, 1883.

CHAS. F. VOGEL,
*Clerk Circuit Court,*
*City of St. Louis.*

[SEAL.]

STATE OF COLORADO, }
*Las Animas Co.* } *ss.*

I hereby certify that this instrument of writing was filed in my office for record at 3.30 o'clock P. M., March fourth, A. D. 1882, and duly recorded in Book 15, pages 108-9.

JESUS MA. GARCIA,
*Recorder.*

Fees, $2.00. Paid.

By NICANOR I. JARAMILLO,
*Deputy.*

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## Exhibit 32.

DEED DATED APRIL 10th, 1882, FROM THOMAS LEITENSDORFER *et al.*, TO T. J. ALLEN, CONVEYING ALL THE LANDS TO WHICH THOMAS LEITENSDORFER CLAIMED TITLE BEFORE THE REGISTER AND RECEIVER.

This indenture, made on the tenth day of April, A. D. one thousand eight hundred and eighty-two, by and between Eugene Leitensdorfer and Thomas Leitensdorfer, of Trinidad, State of Colorado, parties of the first part, and Thomas J. Allen, of the county of Jackson, in the State of Missouri, party of the second part:

Witnesseth: That said party of the first part, in consideration of the sum of twelve thousand dollars, to them paid

by the said party of the second part (the receipt of which is hereby acknowledged), do, by these presents, grant, bargain and sell, convey and confirm, unto the said party of the second part, his heirs and assigns, the following described lots, tracts or parcels of lands. lying, being and situate in the county of Las Animas, and State of Colorado, to wit: All the west half of section thirteen (13), all of sections twenty-two (22), twenty-three (23), twenty-four (24), and twenty-seven (27); the east halves of sections twenty-eight (28), and thirty-two (32), and all of section thirty three (33), in township thirty-two (32), south of range sixty-three (63), west of the sixth principal meridian; also, sections five (5), seven (7), eight (8), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), and twenty-three (23), the west half of section twenty-five (25), all of sections twenty six (26), twenty-seven (27), thirty four (34), and thirty-five (35), and the west half of section thirty-six (36), in township thirty-three, south of range sixty-three west; also, the west half of section one (1), and all of sections two (2), and three (3), in township thirty-four (34), south of range sixty-three (63), west; also, sections thirteen (13), and twenty-four (24), in township thirty-three (33), south of range sixty-four (64), west.

To have and to hold the premises aforesaid, with all and singular, the rights, privileges, appurtenances and immunities thereto belonging, or in any wise appertaining unto the said party of the second part, and unto his heirs and assigns forever, the said grantors hereby covenanting that they lawfully seized of an indefeastible estate, in fee, in the premises herein conveyed; that they have good right to convey the same; and that they will warrant and defend the title to the said premises unto the said party of the second part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

EUGENE LEITENSDORFER, [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]

Signed, sealed and delivered in presence of us.

W. R. WALKER,
P. RASCOVER.

STATE OF COLORADO, }
*County of Las Animas,* } *ss.*

Be it remembered that, on this fourteenth day of April, A. D., 1882, before the undersigned, a notary public within and for the county of Las Animas, and State of Missouri, personally came Eugene Leitensdorfer and Thomas Leitensdorfer, who are personally known to me to be the same persons whose names are subscribed to the forgoing instrument of writing as parties thereto, and acknowledged the same to be their act and deed for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at office in Trinidad, the day and year first above written.

[SEAL.] WILLIAM R. WALKER,
*Notary Public.*

STATE OF COLORADO, }
*Las Animas County.* } *ss.*

I, Henry F. Moore, clerk District Court within and for said county, in the State aforesaid, do hereby certify that William R. Walker, before whom the foregoing warranty deed was taken. was, at the date thereof, a notary public in and for the county of Las Animas, duly commissioned and qualified, and authorized by the laws of Colorado to sign

the same, and that the same is taken in accordance with the laws of Colorado. I further certify that I am well acquainted with his handwriting, and verily believe the signature to the foregoing is genuine.

Witness my hand and official seal at Trinidad, in said county, this fifteenth day of April, A. D., 1882.

[SEAL.] HENRY F. MOORE,
*Clerk.*

[ENDORSED.]

Warranty Deed from Eugene Leitensdorfer and Thos. Leitensdorfer to Thos. J. Allen. Filed for record the 14th day of April, A. D. 1882, at 2 o'clock 6 minutes, P. M. Recorded in book 15, at pages 205-6-7. Jesus Ma. Garcia, Recorder, by Nicano D. Jaramillo, Deputy. Recorder's fees, $2.00

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## Exhibit 33.

SCHEDULE OF LANDS TRANSFERRED TO THE UNITED STATES BY THOMAS LEITENSDORFER AND OTHERS, AFTER SAID LEITENSDORFER HAD CONVEYED ALL HIS INTEREST IN THE LAS ANIMAS GRANT TO JOHN HALLUM, AS PER EXHIBITS.

All the lands embraced in said schedule form part and parcel of those to which said Leitensdorfer claimed title before the Register and Receiver:

N. W. ¼ Sec. 5, and S. W. ¼ of N. E. ¼ Sec. 5.

N. W. ¼ and S. ½ of N. E. ¼, and W. ½ of S. W. ¼, Sec. 7.

E. ½ of S. W. ¼, the S. W. ¼ of S. W. ¼, and S. W. ¼ of N. W. ¼ of Sec. 8,° and the S. W. ¼ of N. W. ¼ of Sec. 18, in T. 33 S., R. 63 W.; and the W. ½ Sec. 13,° in T. 33 S., R. 64 W. Data from U. S. Gen. Land Office.

## Exhibit 34.

DEED DATED APRIL 16, 1877, FROM JOHN HALLUM TO JOSEPHINE FARNSWORTH.

This indenture made and entered into on this, the sixteenth day of April, A. D. 1877, by and between John Hallum, of the County of Lonoke, in the State of Arkansas, of the first part, and Josephine Farnsworth, of the City of St. Louis, in the State of Missouri, of the second part, witnesseth that for and in consideration of the sum of Two Thousand Dollars, money advanced to aid in prosecuting the Las Animas Land grant claim paid to the party of the first part, the receipt whereof is hereby acknowledged, the party of the first part doth by these presents *doth* remise, release, convey, and quit claim unto the party of the second part, her heirs and assigns forever, the following described real estate, lying, being and situated in the County of Las Animas, in the State of Colorado, to wit, all of section twenty-four, and East half of section twenty-eight, and the East half of section thirty-two, in Township Thirty-two (32), South of Range Sixty-three, West of the sixth principal meridian.

And for other divers good and valuable considerations and the additional sum of Five Hundred Dollars, the receipt whereof is hereby acknowledged, the party of the first part doth grant, remise, release, convey and quit claim unto the party of the second part, her heirs and assigns forever, the undivided one-half of that certain lot and property lying, being and situate in the Town of Trinidad County, of Las Animas, and State of Colorado, known as the Overland Hotel property, fronting eighty-eight feet on Main Street, and running back southwesterly two hundred feet, together with one-half of all of the back rents and profits of the said property since 1867, which is now claimed in a suit now

pending between the party of the first part and the heirs of S. M. Baird, dec'd, and others. It is understood that this is a quit claim conveyance, and is to be construed as such.

In witness whereof I have hereunto set my hand and affixed my seal the day and date first above written.

[SEAL.] JOHN HALLUM.

THE STATE OF MISSOURI, } ss:
*County of St. Louis,* }

Be it remembered, that John Hallum, who is personally known to the undersigned, a Notary Public within and for the county and State aforesaid, to be the person whose name is subscribed to the foregoing deed as a party thereto. this day appeared before me, and acknowledged that he executed and delivered the same as his voluntary act and deed, for the uses and purposes therein contained.

In testimony whereof, I have hereunto set my hand and affixed my official seal on this 16th day of April, 1877. I certify that I was qualified as Notary May 13th, 1873, and that my commission expires May 5th, 1877.

E. PARMER,

[SEAL.] *Notary Public.*

STATE OF COLORADO, } ss:
*County of Las Animas,* }

I hereby certify that this instrument was filed for record in my office on the 9th of August, 1877, at 12 M., and was duly recorded in Book No. 7, on pages No. 279 and 280.

JESUS MA. GARCIA,

[SEAL.] *Recorder.*

(Paid $2.00.) By J. R. BROOKING, *Deputy.*

STATE OF MISSOURI, }
*City of St. Louis,* } *ss:*

Be it remembered, that I, Charles F. Vogel, Clerk of the Circuit Court, City of St. Louis, State of Missouri, the same being a court of record of said city and State, hereby certify that Enrique Parmer, the person certifying the acknowledgment of John Hallum, the grantor in the foregoing and attached deed, was, on the 16th day of April, 1877 a duly commissioned, qualified, and acting Notary Public within and for the County of St. Loius, in the State aforesaid; that said E. Parmer resides in the said city of St. Louis, in what was on said 16th day of April, 1877, a portion of the county of St. Louis, and so resided there at said last-named date; that he had at said date full authority by the laws of said State of Missouri to take and certify such acknowledgment; that the signature of said office to the said certificate of acknowledgment is the true signature of said E. Parmer, Notary Public as aforesaid.

Given under my hand and the seal of our said Circuit Court this 24th day of May, 1883.

CHAS. P. VOGEL,
*Clerk Circuit Court,*
*City of St. Louis, Mo.*

[SEAL.]

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NOTE.—For a description of the lands of the Vigil and St. Vrain grant platted and patented to Wm. Craig reference is made to copies of the plat, and of the patent found in the MS. record filed in this cause, pp. 1214 and 588 respectively.

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## Exhibit 35.

This indenture, made this fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-seven, between William Craig, of Pueblo in the County of

Pueblo, State of Colorado, party of the first part, and Olinus Smith of Washington, District of Columbia, party of the second part, witne-seth, that the said party of the first part, in consideration of the debt or sum hereinafter mentioned to be secured, and of the further some of one dollar to him in hand paid by the said party of the second part, before the sealing and delivery hereof, the receipt whereof the said party of the first part does hereby acknowledge, hath granted, bargained, sold, enfeoffed, released and confirmed, and by these presents does grant, bargain, sell, enfeoff, release and confirm, unto the said party of the second part, his heirs and assigns, all those certain pieces or parcels of land situate lying and being in the counties of Pueblo and Huerfano in the State of Colorado known as "Craig's Ranch," containing seventy-three thousand, two hundred and fifty one and 55-100 acres (73,251 55-100) acres, as set forth and described in a decision of the register, Irvin W. Stanton and Charles A. Cook, receiver of the United States Land Office at Peublo, in the State of Colorado, which said decision was made by said register and receiver, February 23, A. D. 1874, under the provisions of an Act of Congress approved February 25th, 1869.

Together with all and singular the appurtenances and the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, use, possession, property, claim and demand of him the said party of the first part, of, in and to the same; to have and to hold the premises hereby granted, with all and singular the appurtenances, unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever. Provided always, nevertheless, and it is the true intent and meaning of these presents, that if the said William Craig, party aforesaid of the first part, his heirs, executors or administrators, do and shall well and truly pay or cause to be

paid unto the said Olinus Smith, party aforesaid of the second part, his executors, administrators and assigns, the sum of two (2) thousand dollars, lawful money of the United States on or before the fifteenth (15) day of June, A. D., 1877, with interest thereon at the rate of ten per cent. per annum until said two (2,000) thousand dollars be paid then and from thenceforth, as well the said obligation as also these presents, and everything herein contained, shall cease and become null and void, anything herein to the contrary in anywise notwithstanding; but on failure of payment thereof, to be and remain in full force.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM CRAIG. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. WILLIAMS,
CHAS. CONS. CALLAN.

DISTRICT OF COLUMBIA, *Washington County.* } *ss.*

Be it known that on the fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-seven, before the subscriber, Clerk of the Supreme Court of the said District, personally appeared William Craig, who, I am satisfied, the grantor mentioned in the foregoing deed or mortgage, and the contents thereof being by me first made known unto him, did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed.

R. J. MEIGS,
*Clerk.*

[Seal of Court.]

By L. S. WILLIAMS,
*Ass't Clerk.*

[ENDORSED.]

**Mortgage.**

WILLIAM CRAIG
to
OLINUS SMITH.

Received in the Clerk's Office of the County of Pueblo, Colo., on the 31st day of March, A. D. 1877, at 1:20 o'clock P. M.. and recorded in Book 12 of Mortgages, pages 580 and 581.

GEO. H. HOBSON,
*Resorder.*

No. 6,329. Fees $2.50, paid.

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## Exhibit, 36.

WARRANTY DEED DATED APRIL 20, 1877, FROM WM. CRAIG TO BENJ. F. BUTLER.

THIS INDENTURE, made this twentieth day of April, in the year of our Lord, one thousand eight hundred and seventy-seven, between William Craig, of the State of Colorado, of the first part, and Benjamin F. Butler, of the city of Lowell, State of Massachusetts, of the second part:

*Witnesseth:* That said party of the first part, for and in consideration of the sum of thirty thousand dollars ($30,000) in lawful money of the United States, to him in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part, his heirs and assigns forever, the following described real estate situate in

the county of Pueblo, State of Colorado, that was awarded to the said William Craig by the decision of the Register and Receiver of the United States Land Office at Pueblo, State of Colorado, on February 23d, 1874, under the provisions of an Act of Congress approved February 25th, 1869, and as evidence of title of which lands an approved plat has been furnished by the Surveyor-General of the said Land District of Colorado, which now remains in the General Land Office of the United States for delivery, after the same shall have been examined and approved by the Commissioner, to wit: South half of southeast quarter (S. ½ S. E. ¼) of section fifteen (15), Township twenty-three (23), south of Range sixty-three west (S. R. 63 W.) containing eighty (80) acres; south half of southwest quarter (S. ½ S. W. ¼) of section fifteen (15), Township twenty-three (23), south of Range sixty-three west (S. R. 63 W.) containing eighty (80) acres; all of sections twenty-one (21) and twenty-two (22), Township twenty-three, south of Range sixty-three west (T. 23, S. R. 63 W.) containing six hundred and forty (640) acres each; south half (S. ½) of section twenty-five (25), and south half (S. ½) of section twenty-six (26), Township twenty three, south of Range sixty-three west (T. 23, S. R. 63 W.) containing three hundred and twenty (320) acres each; all of sections twenty-seven (27), twenty-eight (28), twenty-nine (29). thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35) and thirty-six (36), Township twenty-three, south of Range sixty-three west (T. 23, S. R. 63 W.) containing respectively six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and thirty-seven and forty-eight one hundredths (637–48) acres, six hundred and thirty-two and ninety-two one hundredths (632–92) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640)

acres, six hundred and forty (640 acres; all of sections one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32) and thirty six (36), of Township twenty-four, south of range sixty-three west (T. 24, S. R. 63 W.), containing respectively six hundred and thirty-seven and sixty-eight one hundredths (637–68) acres, six hundred and thirty-six and eight one hundredths (636.08) acres, six hundred and thirty-seven and seventy-six one hundredths (637.76) acres, six hundred and thirty-eight and ninety-six one hundredths (638–96) acres, six hundred and forty and eighty-eight one hundredths (640–88) acres, six hundred and thirty-one and thirty-five one hundredths (631–35) acres, six hundred and thirty and sixty-six one hundredths (630–66) acres, six hundred and forty (640) acres; six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and thirty and eighty-four one-hundredths (630.84) acres, six hundred and thirty-two and twenty-four one-hundredths (632.24) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and thirty-two

and sixty-four one-hundreths (632.64) acres, six hundred and thirty-two and ninety-two one-hundredths (632.92) acres, six hundred and forty (640) acres, six hundred and forty (640) acres; all of sections one (1), five (5), six (6), seven (7), eight (8), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), of Township twenty-five, south of range sixty-three west (T. 25, S. R. 63 W.), containing respectively six hundred and forty one and sixty one-hundredths (641.60) acres, six hundred and thirty-three and twelve one-hundredths (633.12) acres, six hundred and twenty-eight and thirty-seven one-hundredths (628.37) acres, six hundred and thirty-one and fifty-two one-hundredths (631.52) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and thirty-three and sixty-eight one-hundredths (633.68) acres, six hundred and thirty-seven and twenty-eight one hundredths 637.28) acres, six hundred and forty (640) acres, and six hundred and forty (640) acres; north half (N. $\frac{1}{2}$) of section twenty-two (22) and southwest quarter (S. W. $\frac{1}{4}$) of section twenty-two (22), Township twenty five south of south of Range sixty-three west (T. 25, S. R. 63 W.), containing respectively, three hundred and twenty (320) acres, one hundred and sixty (160) acres; west half of southeast quarter (W. $\frac{1}{2}$, S. E. $\frac{1}{4}$) of section twenty-two (22), Township twenty-five, south of Range sixty-three west (T. 25, S. R. 63 W.), containing eighty (80) acres, east half (E. $\frac{1}{2}$) of section twenty-three (23), east half of northwest quarter (E. $\frac{1}{2}$, N. W. $\frac{1}{4}$) of section twenty-three (23), northwest quarter of northwest quarter (N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$) of section twenty-three (23), southwest quarter of southwest quarter (S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$) of section twenty-three (23), east half of

southwest quarter (E. $\frac{1}{2}$, S. W. $\frac{1}{4}$) of section twenty-three (23), Township twenty-five, south of Range sixty-three west (T. 25, S. R. 63 W.), containing respectively, three hundred and twenty (320) acres, eighty (80) acres, forty (40) acres, forty (40) acres, eighty (80) acres; all of sections twenty-four (24), twenty-six (26) and twenty-seven (27), Township twenty-five, south of Range sixty-three west (T. 25, S. R. 63 W.), containing six hundred and forty (640) acres each; all of section twenty-five (25), southeast quarter (S. E. $\frac{1}{4}$) of section twenty-six (26), and of all sections thirty-four (34), thirty-five (35) and thirty-six (36), Township twenty-three, south of Range sixty-four west (T. 23, S. R. 64 W.), containing respectively, six hundred and forty (640) acres, one hundred and sixty (160) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres; all of sections one (1), two (2), three (3), four (4), east half (E. $\frac{1}{2}$) of section five (5), all of sections eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15) sixteen (16), seventeen (17), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), east half (E. $\frac{1}{2}$) of section thirty-two (32), all of sections thirty-three (33), thirty-four (34), thirty-five (35) and thirty-six (36), Township twenty-four, south of Range sixty-four west (T. 24, S. R. 64 W.), containing respectively six hundred and thirty-nine and thirty-two one hundredths (639–32) acres, six hundred and thirty-four and ninety-two one hundredths (634–92) acres, six hundred and thirty (630) acres, six hundred and twenty-eight and twenty one-hundredths (628–20) acres, three hundred and fourteen and sixty-five one hundredths (314–65) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty

(640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, three hundred and twenty (320) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres; all of sections one (1), two (2), three (3) and four (4), northeast quarter (N. E. $\frac{1}{4}$) of section five (5), east half (E. $\frac{1}{2}$) of section nine (9), all of sections ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15), north half of northeast quarter (N. $\frac{1}{2}$ N. E. $\frac{1}{4}$) of section twenty-two (22), and all of sections twenty-three (23) and twenty-four (24), Township twenty-five, south of Range sixty-four west (T. 25, S. R. 64 W.), containing respectively six hundred and forty-two and sixty-eight one hundredths (642–68) acres, six hundred and forty-three and eighty one hundredths (643–80) acres, six hundred and forty-two and eighty one hundredths (642–80) acres, six hundred and forty-two and eighty one hundredths (642–80) acres, one hundred and sixty-one and sixteen one hundredths (161–16) acres, three hundred and twenty (320) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, six hundred and forty (640) acres, eighty (80) acres, six hundred and forty (640) acres, six hundred and forty (640) acres; said parcels of land containing in the aggregate seventy-one thousand six hundred and thirty-eight and thirty-one one hundredths (71,638–31) acres, more or less. And for a more particular description of said real estate or

tracts of land herein conveyed to the said Butler by the said Craig, reference is hereby made to the map filed by the said Craig, and referred to in the decision of the said Register and Receiver, and also to the approved plat aforesaid, together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging, or in any wise appertaining, and all the remainders, reversions, rents, issues and profits thereof; and all the estate, right, title, interest and claim whatsoever, either at law or in equity, of the said party of the first part, of, in, and to, the said pieces or parcels of land and premises.

To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit and behoof forever.

And the said William Craig, for himself and for his heirs, executors and administrators, does hereby covenant, that the premises are free from all incumbrance to and with said party of the second part, his heirs and assigns, that the said party of the first part, and his heirs shall and will warrant and forever defend the said pieces or parcels of ground and premises and appurtenances, unto the said party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under, or through him, his heirs and assigns.

And further, that he, the said party of the first part and his heirs, shall and will at any and at all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make, execute, deliver, and acknowledge all such other deed or deeds, or other assurance in law, for the more certain and effectual conveyance of the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or

assigns, or his counsel, learned in the law, shall advise, desire or require.

In testimony whereof the said party of the first part has hereunto set his hand and seal on the day and year first hereinbefore written.

[SEAL.] WILLIAM CRAIG.

Signed, sealed and delivered in the presence of—
B. P. SNYDER.

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UNITED STATES OF AMERICA, } *ss*:
*District of Columbia.* }

I, Thomas R. Jones, a Notary Public in and for the District aforesaid, do hereby certify that William Craig party to a certain deed, bearing date on the twentieth day of April, A. D. 1877, and hereunto annexed, personally appeared before me in the District aforesaid, the said William Craig, being personally well known to me to be the person who executed the said deed and acknowledged the same to be his act and deed, before me a Notary Public duly authorized and commissioned as such.

Given under my hand and notarial seal this seventh day of May, A. D. 1877.

THOMAS R. JONES,
[SEAL.] *Notary Public.*

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CLERK'S OFFICE OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

DISTRICT OF COLUMBIA. } *ss:*

I, R. J. Meigs, Clerk of the said Court, do hereby certify that Thomas R. Jones, Esq., whose name is subscribed to

the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the said District, dwelling therein, commissioned, sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of said Thomas R. Jones, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine, and the said instrument is executed and acknowledged according to the laws of this District.

In testimony whereof, I have hereunto set my name and affixed the seal of said Court this 31st day of May, A. D. 1877.

{ SEAL OF THE SUPREME COURT, D. C. }

R. J. MEIGS,
*Clerk.*
By M. A. CLANCY,
*Assistant Clerk.*

[ENDORSED.]

Warranty Deed.—William Craig to Benjamin F. Butler

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STATE OF COLORADO, } *ss:*
*County of Pueblo.* }

I hereby certify that the within deed was filed for record at 3.05 o'clock p. m., June 15th, A. D. 1877, and duly recorded in Book 17, on pages 504–5–6–7–8 and 9, (June 15, 1877.)

GEO. H. HOBSON,
*Recorder.*

No. 6,453. Fees, $7.50–100.

STATE OF COLORADO, } ss:
*County of Pueblo.* }

I hereby certify that this deed was filed for record at 9.05 o'clock a. m., May 17th, A. D. 1877, in my office, and duly recorded in Book 17, pages 488–9–90–1–2.

GEO. H. HOBSON,
*Recorder.*

No. 6,405. Fees, $7.25–100.

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## Exhibit 37.

PRAYERS FOR RELIEF IN AMENDED BILL, MS., R., p. 121.

Your orator prays, that after due proceedings herein, the approved plats of the derivative claim of defendant, William Craig, signed by the defendant, Campbell, on the 26th day of May, 1877, be decreed void from the beginning, and that said defendant, William Craig, be forever enjoined from prosecuting any suit in law or equity on said approved plat or plats as evidence of title, or that Craig be adjudged as holding the same in trust for plaintiff and other derivative claimants, and that defendant, William Craig and agents, and defendant, William L. Campbell, as United States Surveyor-General of Colorado, and his successors in office and all under them, be ordered within a time to be limited by this Court to deliver the said plats to the Court, and that the said plats be thereupon cancelled, and he prays for all other general and special relief applicable to the case.

And your orator further prays that it may please your Honors and this Court to grant him subpœnas, &c.

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## Exhibit 38.

BILL OF COMPLAINT DISMISSED IN PART, R., p. 296.

This day came Thomas Leitensdorfer, complainant, by John Hallum and John Q. A. King, his attorneys, and moves the Court to dismiss, and does hereby dismiss so much of the complainants suit, and prayer of the bill, and amended bill as seeks to hold the defendant, William Craig as trustee in trust for complainant.

Filed January 30, 1879.

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## Exhibit 39.

FINAL DECREE, R., p. 1,237.

It is therefore ordered, adjudged and decreed, that the decision or award of the Register and Receiver of the lands described in the bill and pleadings of the 23d of February, 1874, in favor of defendant, William Craig, is fraudulent and void.

And it is further ordered, adjudged and decreed that the patent for the said lands issued to defendant, William Craig, on the 8th day of January, 1878, be and it is hereby declared and decreed to be null and void, and that the approved plat or plats delivered to defendant, William Craig, as evidence of title to the land described in the bill by Wm. Campbell, Surveyor-General, be and the same are hereby decreed to be null and void.

And it is further ordered, adjudged and decreed by the Court that the defendant, Wm. Craig, pay all the costs, &c.

## Exhibit 39 1-2.

* * * "Thomas Leitensdorfer, in 1873, in the month of June, conveyed the Leitensdorfer interest in the Las Animas Grant to me. One-half of said interest was conveyed to me by him for my own use and to secure counsel to prosecute his claim. The other half was to me in trust for himself and he yet owns one-half of the said Leitensdorfer interest. I conveyed the half interest which I so held in trust for him, about ten months afterwards, to Josephine Farnsworth, his sister, in trust for him, though there is no trust expressed on the face of either of the conveyances mentioned. It was the wish of Thomas Leitensdorfer that his interest should not appear on the face ot the conveyance. His reasons for so wishing were that his life was in danger and that if it was known or believed that he no longer had an interest in it the danger would cease. About the 1st of August, 1873, I left a deed purporting to convey one-half interest in this grant or Leitensdorfer claim, to one Joseph A. Adams, for the consideration of twenty-five thousand dollars to be paid in cash upon the delivery of the deed to said Adams. I left this deed as an escrow with Charles A. Cook, at his, (Cook's) solicitation. He represented himself as the agent of Adams; that Adams was then East and would return in a month or so. That he, Adams, was a wealthy citizen of Arapahoe County, Colorado; that upon his, Adams', return to Denver, if he, Adams, did not take the property and pay for it, then he, Cook, would return the deed to me.

* * * * * * * *

In October, 1873, I came to the Territory again, and Mr. Cook told me that Adams had declined to take it. I then demanded the return of the escrow to me. He said that it was in his safe at Denver, and that the first time he went to Denver he would get it and mail it to me at St. Louis,

Missouri, where I then resided. But he never returned the escrow to me, up to this time. No consideration whatever was ever paid, in any way, shape, manner or form, for this escrow. This escrow was afterwards, by some person to me unknown, fraudulently put upon the records of Las Animas County. The Recorder states that it was enclosed to him with a letter purporting to have been written by Joseph S. Adams. It was done to checkmate and prevent any further advantage being taken of this effort to get the property in question without any consideration whatever. After I had discovered the fraud attempted to be thus *perpetuated* upon me, I conveyed this identical interest to A. J. Heath, of St. Louis, Missouri, and recited this fraud in the preamble of the conveyance to him. And I put this deed upon record, as legal notice to all the world that Mr. Adams had no title, and the next day Mr. Heath conveyed the same land, or rather interest in the land, back to me. The only object I had in making the conveyance to Heath and in taking the re-conveyance from him back to myself, was, to prevent any further fraud being *perpetuated* by reason of this escrow, or pretended purchase by Adams. The re-conveyance from Heath to myself has not yet been recorded." * * * *

(Deposition of John Hallum, Dec. 9, 1878, R., p. 220.)

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## Exhibit 40.

Know all men by these presents, that I, Joab Houghton, by virtue of the power and authority in me vested by a certain power of attorney to me made and executed by Ceran St. Vrain, Spruce M. Baird and others, bearing date the 5th day of November, A. D. 1859, for and in consideration of the sum of one hundred dollars to me in hand paid,

the receipt whereof is hereby acknowledged, and for certain other valuable consideration hereinafter mentioned, have by these presents, sold, granted, quit-claimed and assigned unto William Craig, his heirs, and assigns forever a certain piece of land situate on the Huerfano River, in the Territory of New Mexico, and included in the grant of land made by the late Mexican Government to Ceran St. Vrain and Cornelio Vigil, and confirmed to the same and to their assigns and legal representatives by the Surveyor General of New Mexico. Said piece or parcel of land comprising one mile of the valley of the said River Huerfano, and known on a map of survey of the valley of said river, made by me as Section "*C*," and is bounded on the east and west by the high lands lying on each side of said valley, on the south by Section "*F*" of said survey, and on the north by lands of A. C. Houghton, together with the privilege in common of pasture, water, wood, timber and stone upon all parts of the said grant, known as the Las Animas Grant, not included in the valleys of the streams, or in such parts as may have been specially granted and conveyed by the said owners to other parties. And I do hereby agree, by virtue of the power and authority in me vested as aforesaid, to warrant and defend the same against the lawful claims of all persons claiming by, through or under me, or the owners of the grant aforesaid. Conditioned however, that in addition to the consideration hereinbefore mentioned as satisfied, the said William Craig is held, bound to settle upon and improve the said premises on or before the 1st day of October, A. D. 1863, or cause the same to be done or forfeit said lands. In witness whereof, I have hereunto set my hand and seal this 1st day of July, A. D. 1860.

Executed and delivered in the presence of—

[L. S.] J. HOUGHTON,

*Attorney for Ceran St. Vrain, Spruce M. Baird, et al.*

Interlineation over the thirty-fifth line from the top made before the signing and sealing of the foregoing document.

Witnesses to the signature of J. Houghton:—

JOHN I. WATTS,
THEO. D. WHEATON.

THE UNITED STATES OF AMERICA, }
*Territory of New Mexico.* }

Before me, the undersigned, Clerk of the Supreme Court of the said Territory of New Mexico, personally appeared, Joab Houghton, known to me to be the same person who signed the foregoing deed and conveyance, and acknowledged that he signed, sealed and delivered the same on the day and year therein written, and for the purposes and designs mentioned, as his voluntary act and deed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 29th day of September, A. D. 1860.

[SEAL OF THE COURT.] SAM'L. ELLISON,
*Clerk.*

TERRITORY OF COLORADO, }
*County of Pueblo.* } *ss.*

We, the undersigned, whose names are signed to the within deed of our agent and attorney in fact, J. Houghton, do hereby ratify the same and acknowledge the conditions contained in said deed to be fulfilled.

Witness our hands and seals this 10th day of June, A. D. 1869.

CERAN ST. VRAIN, [SEAL.]
SPRUCE M. BAIRD. [SEAL.]

(ENDORSED.)

Ceran St. Vrain by J. Houghton, Atty., to Wm. D. Craig. Deed.

This deed ratified by deed of May 4, 1863, and by Ceran St. Vrain himself at the foot of this deed, outside. (See 4th page.)

Recorded the within Instrument Sept. 30th, 1864, at 3 o'clock P. M. in Vol. 2, pages 30, 31 and 32 of the Records of Huerfano County, Colorado Territory.

| Received. | Fees for recording same: |
|---|---|
| 5 Folios | - 1.50 |
| Indices | - .20 |
| Certificate | - .30 |
| | $2.00 |

GEO. S. SIMPSON, *Recorder*,
By R. S. KERRATT, *Deputy*.

I hereby certify that the within deed was filed for record at 11 o'clock A. M., August 9th, 1871, and duly recorded in Vol. 3, pages 494, 495 and 496 of Records.

J. D. MILLER,
*Recorder*.

Fees $2, 1–2 paid. No. 349 July 1, 1860.

TERRITORY OF COLOPADO, }
*Pueblo County*. }

I hereby certify that the within deed was filed for record at 15 minutes past 12 o'clock M., April 8th, A. D. 1869, and duly recorded in Vol. 2, pages 38 and 39, Book of Record.

J. D. MILLER,
*Recorder*.

Fees 2, .50 paid. No. 4.

Filed in United States Land Office, Pueblo, Colorado, by W. F. Stone, Att'y, February 12, 1872.

IRVING W. STANTON, *Register*.

## Exhibit 41.

For a good, bona fide and valuable consideration to us in hand paid by J. O. Packer, of Las Animas County, Colorado Territory, we, the undersigned, John Hallum and Thomas Leitensdorfer, citizens of said County and Territory, do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interest of every nature whatsoever which we or either of us have in and to that certain piece, parcel or tract of land lying, being and situated in the County of Las Animas, in the Territory of Colorado and in the Pueblo Land District, described as follows, to wit: the northeast quarter of the northwest quarter of section eighteen in township thirty-three, south of range sixty-three west, it being a part of the derivative claim of Thomas Leitensdorfer under the original grantees Vigil and St. Vrain, to the Las Animas Grant.

Witness our hands and seals this the 3d day of August, 1876.

JOHN HALLUM. [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]

TERRITORY OF COLORADO, } *ss.*
*County of Las Animas.* }

On this third day of August A. D. 1876, personally appeared before the undersigned, a notary public, within and for said County and Territory, John Hallum and Thomas Leitensdorfer, who are personally known to me, C. L. Boothby, the said Notary Public, to be the persons who executed the next foregoing instrument of relinquishment, and who, after having been made acquainted by me with the contents of the same, acknowledged, each of them, that they severally made and executed the said instrument as their voluntary act and deed for the uses and purposes therein stated. Wit-

ness my hand and Notarial seal on the day and year first above written.

[NOTARIAL SEAL] C. L. BOOTHBY,
*Notary Public.*

ENDORSED.

John Hallum and Thomas Leitensdorfer to United States Government, 3 August, 1876; relinquishment of N. E. 1–4 N. W. 1–4, Sec. 18, T. 33–63 W., Pueblo District, Colorado.

STATE OF COLORADO, } ss.
*Las Animas County.* }

I hereby certify that this instrument of writing was filed in my office for record on the 21st day of August, 1876, at 9 o'clock and 30 minutes and duly recorded in book No. 6 on page 584 and 585.

JESUS MA. MARCIA,
*Clerk and Recorder.*
By J. R. BROOKING,
*Deputy.*

Fees $1.65.
Referred to D. Jan. 13, 1883. Horner.

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## Exhibit 42.

Know all men by these presents, that I, Thomas Leitensdorfer, of the County of Las Animas, in the Territory of Colorado, for a good, valuable and *bona fide* consideration to me in hand paid, and in further consideration of the fact that the hereinafter described lands have been settled upon, and are now occupied by Charles P. Treat and Mary W. Treat, with a view to pre-empt the same under the laws of the United States, both relinquished, and do by these presents, relinquish unto the United States of America, all

the right, title, claim and interest or demand which I now have in and to the following described lands, lying, being and situate in the County of Las Animas, and Territory of Colorado, to wit, the northwest quarter of section thirteen and the northwest quarter of the northeast quarter of section thirteen, all in section thirteen, township thirty-three (33) south of range sixty-four (64) west, Pueblo Land District. This land being a part of my claim to the Las Animas Land Grant, now pending before the General Land Office at Washington. The northwest quarter of the northeast quarter of said section thirteen was included in a forged relinquishment by one James P. Beck, dated June the 16th, 1873, and by him filed in the local Land Office at Pueblo.

Given under my hand and seal this 23d day of October, A. D. 1875.

[SEAL.] THOMAS LEITENSDORFER.

Attest:

JOHN HALLUM.

TERRITORY OF COLORADO. }
*County of Las Animas.* } *ss.*

I, Jerome G. Abbot, a Notary Public in and for said County, in the Territory aforesaid, do hereby certify that Thomas Leitensdorfer, personally known to me to be the same person whose name is subscribed to the annexed and foregoing instrument of writing, appeared before me this day, in person, and acknowledged that he signed, sealed and delivered said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 23d day of October, A. D. 1875.

[L. S.] JEROME G. ABBOTT,
*Notary Public.*

[ENDORSED.]

L. 76,080.

Thomas Leitensdorfer to United States, 23d October, 1875.

Relinquishment.

[COPY.]

The originals filed in the Pre-emption Div., December 3d, 1875.

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## Exhibit 43.

Know all men, by these presents that I, Thomas Leitensdorfer, of the County of Las Animas and Territory of Colorado, for a good, valuable and bona fide consideration to me in hand paid, and also in consideration of the fact that John W. Terry is occupying the hereinafter described land with a view of pre-empting the same, I hereby *relinquish* and forever surrender unto the United States of America all my right, title, interest, claim and demand of every nature whatsoever, to and in the northwest quarter of the southeast quarter (N. W. 4, S. E. 4) of section (13,) in township thirty-three (33) south, rahge sixty-four (64) west of the sixth principal meridian.

In testimony whereof, I hereunto set my hand and seal this third day of November A. D. eighteen hundred and seventy-five, (1875.)

THOMAS LEITENSDORFER. [SEAL.]

Attest:

JOHN HALLUM.

TERRITORY OF COLORADO, } ss.
*County of Las Animas.* }

I, Jerome G. Abbott, a Notary Public in and for said County, in the Territory aforesaid, do hereby certify that Thomas Leitensdorfer, personally known to me to be the same person whose name is subscribed to the annexed and foregoing instrument of writing, appeared before me this day, in person, and acknowledged that he signed, sealed and delivered said instrument of writing as his free and voluntary act for the purposes and uses therein set forth.

Given under my hand and Notarial seal, this third day of November, A. D. 1875.

(L. S.) JEROME G. ABBOTT,
*Notary Public.*

ENDORSED.

[Copy.]

Thomas Leitensdorfer to the United States, 3 Nov., 1875.

Relinquishment of N. W. ¼, S. E. ¼ Sec. 15, T. 33 S., R. 64 W.

Pueblo Land District,

Colorado.

The original filed in the Pre-emption Div., Dec. 3, '75.

Notes in tract book.

D. K.

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## Exhibit 44.

For a good, *bona fide*, and valuable consideration to us in hand paid by J. O. Packer, of Las Animas County, Colorado Territory, we, the undersigned, John Hallum and Thomas Leitensdorfer, citizens of said County and Territory,

do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interest of every nature whatsoever which we, or either of us, have in and to that certain piece, parcel or tract of land lying, being, and situate in the County of Las Animas, in the Territory of Colorado and in the Pueblo Land District, described as follows, to wit: the northeast quarter of the northwest quarter of section eighteen, in township thirty-three, south of range sixty-three west, it being a part of the derivative claim of Thomas Leitensdorfer under the original grantees, Vigil and St. Vrain, to the Las Animas Grant. Witness our hands and seals this the 3d day of August, 1876.

JOHN HALLUM, [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]

---

TERRITORY OF COLORADO, }
*County of Las Animas.* } *ss.*

On this third day of Aug., A. D. 1876, personally appeared before the undersigned, a notary public within and for said County and Territory, John Hallum and Thomas Leitensdorfer, who are personally known to me, C. L. Roothby, the said notary public, to be the persons who executed the next foregoing instrument of relinqishment, and who, after having been made acquainted by me with the contents of the same, acknowledged, each of them, that they severally made and executed the said instrument as their voluntary act and deed, for the uses and purposes therein stated.

Witness my hand and notarial seal on the day and year first above written.

[SEAL.]

C. L. BOOTHBY,
*Notary Public.*

[ENDORSED.]

John Hallum and Thomas Leitensdorfer to U. S. Government. 3 August, 1876. Relinquishment of N. E. ¼, N. W. ¼, Sec. 18, T. 33-63 W. Pueblo Dist., Colorado.

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STATE OF COLORADO, }
*Las Animas County.* } *ss.*

I hereby certify that this instrument of writing was filed in my office for record on the 21st day of August, 1876, at 9 o'clock and 30 minutes, and duly recorded in book No. 6, on page 584 and 585.

JESUS MA. GARCIA,
*Clerk and Recorder.*
By J. R. BROOKING,
*Deputy.*

Fee, 1.65.
Originals in Pre-emption Div.; also letter of transmitter.

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## Exhibit 45.

For good, *bona fide*, and valuable consideration to us in hand paid by Richard de Palma, of the County of Las Animas, and State of Colorado, we, the undersigned, John Hallum, Josephine Farnsworth and Thomas Leitensdorfer, do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interest of every nature whatever, which we or either of us have in and to the certain piece, parcel, or tract of land, lying, being and situate in the County of Las Animas, and State of Colorado, and in the Pueblo Land Office District, described as follows, to wit.: The S. ½ of the S. W. 4, and the N. E. ¼

of the S. W. ¼ of section No. 8, Township 33 S. of Range 63 West of the 6th Principal Meridian, it being a part of the derivative claim of Thomas Leitensdorfer, under the original grantees Vigil and St. Vrain to the Las Animas Grant.

Witness our hands and seals this 10th day of December, A. D. 1881.

JOHN HALLUM. [SEAL.]
JOSEPHINE FARNSWORTH. [SEAL.)
THOMAS LEITENSDORFER. [SEAL.]

Witness:
W. R. Walker.

---

STATE OF MISSOURI, } ss.
*City of St. Louis.* }

I, Eugene Parmer, Notary Public in and for said City, in the State aforesaid, do hereby certify that Josephine Farnsworth, personally known to me to be the person whose name is subscribed to the annexed relinquishment, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument of writing as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of December, A. D. 1881. My term of office expires June 26th, 1885.

[L. S.] EUGENE PARMER,
*Notary Public.*

---

STATE OF COLORADO, } ss.
*Arapahoe County.* }

I, Sam S. Landen, a notary public, in and for the said County in the State aforesaid, do hereby certify that John

Hallum, personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of December, A. D. 1881.

[L. S.] SAM S. LANDON,
*Notary Public.*

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STATE OF COLORADO, } ss.
*Las Animas County.* }

I, William R. Walker, a notary public, in and for said County in the State aforesaid, do hereby certify that Thomas Leitensdorfer, personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 23d day of December, A. D. 1881.

[L. S.] WILLIAM R. WALKER,
*Notary Public.*

[ENDORSED.]

STATE OF COLORADO, } ss.
*Las Antmas County.* }

This certifies that the within and annexed instrument of writing was filed for record in my office on December 24th,

A. D 1881, at 12 M., and is duly recorded in book 15, pages 16, 17 and 18 of Land Records.

JESUS MA. GRACIA, *Recorder*,
By PEDRO C. CHAVES, *Depy.*

Letter and original in Div. G.

(File with Thomas Leitensdorfer's Las Animas derivative claim papers.)

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## Exhibit 46.

For good, *bona fide* and valuable consideration to us in hand paid by Rafael Chacon, of the County of Las Animas and State of Colorado, we the undersigned, John Hallum, Josephine Farnsworth and Thomas Leitensdorfer, do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interest of every nature whatever which we or either of us have in and to the certain piece, parcel or tract of land, lying, being and situate in the County of Las Animas in the State of Colorado, and in the Pueblo Land District described as follows, to-wit: The W. ½ S. W. ¼ of section 7 and N. W. ¼ section 18, Township 33 S., of Range 63, west of the 6th principal meridian, it being a part of the derivative claim of Thomas Leitensdorfer, under the original grantees, Vigil & St. Vrain to the Las Animas grant.

Witness our hands and seals this 26th day of November, A. D. 1881.

JOHN HALLUM. [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]
JOSEPHINE FARNSWORTH. [SEAL.]

---

STATE OF COLORADO, }
*County of Las Animas.* }

I, W. R. Walker, a Notary Public in and for said county, in the State aforesaid, do hereby certify that John Hallum and Thomas Leitensdorfer, personally known to me to be the persons whose names are subscribed to the annexed relinquishment, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26th day of November, A. D. 1881.

[L. S.] WILLIAM R. WALKER,
*Notary Public.*

---

CITY OF ST. LOUIS, }
*State of Missouri.* } *ss:*

I, Enrique Parmer, a Notary Public, within and for the city and State aforesaid, certify that Josephine Farnsworth, personally known to me to be the person whose name is subscribed to the within relinquishment, appeared before me this day in person, and acknowledged that she signed, sealed and delivered the said instrument of writing as her free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of November, A. D. 1881.

[L. S.] ENRIQUE PARMER,
*Notary Public.*

[ENDORSED.]

John Hallum *et al.* to Rafael Chacon.

STATE OF COLORADO, }
*County of Las Animas.* } *ss:*

I hereby certify that this instrument of writing was filed for record in my office at 10 : 20 o'clock, A. M., December 20th, A. D. 1881, and duly recorded in book 10, page 701, Land records.

JESUS MA. GARCIA, *Recorder.*

[SEAL.] By PEDRO C. CHACON, *Deputy.*

Fees, $1.50.

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Letter and original referred to Div. f., Jany. 12, 1882.

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## Exhibit 47.

Know all men by these presents that we, John Hallum and Thomas Leitensdorfer, derivative claimants to the Las Animas Grant, under Cornelio Vigil and Ceran St. Vrain, have this, the 26th day of September, A. D. 1876, for a good, valuable, and *bona fide* consideration, remised, released, and relinquished unto the United States of America, all the right, title, claim and interest, of every *motive* whatsoever which we have in and to that certain piece, parcel, or tract of land, lying, being and situate in the County of Las Animas, in the State of Colorado, and in the Pueblo Land District, being the northwest quarter of section seven (7) in township thirty-three (33) south of range 63 west.

Witness our hands and seals day and date above written.

(Signed), THOMAS LEITENSDORFER. [SEAL.]

JOHN HALLUM. [SEAL.]

---

STATE OF COLORADO,
*County of Las Animas.*

This day personally appeared before me, C. L. Boothby, a Notary Public within and for the county of Las Animas, in the State of Colorado, Thomas Leitensdorfer and John Hallum, both of whom are personally well-known to me, and each of them acknowledged before me that they signed, sealed, executed and delivered the within and foregoing relinquishment to the United States of America, for the uses and purposes therein expressed and set forth.

Witness my hand and official seal, this 26th day of September, A. D. 1876.

[NOTARIAL SEAL.]

C. L. BOOTHBY,
*Notary Public.*

---

STATE OF COLORADO,
*County of Las Animas.* } *ss.*

I, M. Beshvar, sole Presiding Judge and Acting Clerk of the County Court of said Las Animas County, Colorado, do hereby certify the above and foregoing to be a true, perfect and complete copy of an original instrument of writing, purporting to be a relinquishment made by Thomas Leitensdorfer and John Hallum, to the United States, duly acknowledged before C. L. Boothby, Notary Public, on the 26th day of September, A. D. 1876.

In witness whereof, I have hereunto affixed my hand and the official seal of the County Court of Las Animas County aforesaid, this 3d day of August, A. D. 1877.

[SEAL.]

M. BESHVAR,
*County Judge and Acting Clerk.*

## Exhibit 48.

For a good, *bona fide* and valuable consideration to us in hand paid by Jose Andres Salazar of the County of Las Animas and State of Colorado, we, the undersigned, John Hallum, Josephine Farnsworth and Thomas Leitensdorfer, do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interes tof every nature whatever which we or either of us have in and to the certain piece, parcel, or tract of land, lying, being and situated in the County of Las Animas, in the State of Colorado and the Pueblo Land District, described as follows, to wit: The S. W. ¼, N. E. ¼ S. 18, Tp. 33 S., R. 63 W., of the 6th principal meridian, it being a part of the derivative claim of Thomas Leitensdorfer under the original grantees Vigil & St. Vrain, to the Las Animas Grant.

Witness our hands and seals this 26th day of November, A. D. 1881.

JOHN HALLUM, [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]
JOSEPHINE FARNSWORTH, [SEAL.]

---

STATE OF COLORADO, }
*County of Las Animas.* }

I, William R. Walker, a Notary Public, in and for said County, in the State aforesaid, do hereby certify that John Hallum and Thomas Leitensdorfer, personally known to me to be the persons whose names are subscribed to the annexed relinquishment, appeared before me this day, in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 26th day of November, A. D. 1881.

[L. S.] WILLIAM R. WALKER,
*Notary Public.*

CITY OF ST. LOUIS, } ss.
*State of Missouri.* }

I, Enrique Parmer, a Notary Public, within and for the City and State aforesaid, certify that Josephine Farnsworth, personally known to me to be the person whose name is subscribed to the within relinquishment, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument of writing as her free and voluntary act for the uses and purposes therein set forth.

Term expires June 26th, 1885.

Given under my hand and Notarial Seal this 30th day of November, A. D. 1881.

ENRIQUE PARMER,
*Notary Public.*

[L. S.]

[ENDORSED.]

*John Hallum et al. to Jose Andares Salazar.*

---

STATE OF COLORADO, } ss.
*County of Las Animas.* }

I hereby certify that this instrument was filed for record in my office at 10:25 o'clock A. M., December 20th, A. D. 1881, and duly recorded in Book 10, page 702, Land Record.

JESUS MA. GARCIA,
*Recorder.*
By PEDRO C. CHACON,
*Deputy.*

[SEAL.]

Fees $1.50.

## Exhibit 49.

Know all men by these presents that we, Thomas Leitensdorfer and John Hallum of Las Animas County, Colorado Territory, in consideration of a good and valuable consideration received by us, do hereby relinquish unto the United States all the right, title, interest, claim or demand which we have acquired or now have in or to the hereinafter described tract of land, by virtue of the original Vigil and St. Vrain Grant of land, and by virtue of the derivative claim of the said Thomas Leitensdorfer under the Vigil and St. Vrain Land Grant, and by virtue of any and every other right or claim whatsoever; said tract herein relinquished being described as follows, to wit.:

The Northwest Quarter (N. W. ¼) of Section No. Five (5), Township Thirty-three (33), South of Range Sixty-three (63), West of the Sixth (6th) Principal Meridian, containing one hundred and sixty acres.

Witness my hand and seal this 10th day of May, A. D. 1875.

THOMAS LEITENSDORFER. [SEAL.]
JOHN HALLUM. [SEAL.]

---

TERRITORY OF COLORADO, } *ss.*
*County of Las Animas.* }

On this 10th day of May, A. D. 1875, before me came Thomas Leitensdorfer and John Hallum, both known to me as being the identical persons who subscribed the foregoing instrument in writing, and acknowledged that they each and individually executed the same freely and voluntarily for the uses and purposes therein set forth.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year last above mentioned.

[L. S.]
15B

JOHN W. TERRY,
*Notary Public.*

## Exhibit 50.

This Indenture of release and quit-claim made and entered into on this 26th day of July, eighteen hundred and eighty, by and between Thomas Leitensdorfer, of Las Animas County, Colorado; John Hallum, of Lonoke County, Arkansas, and Josephine Farnsworth, of St. Louis, Missouri, parties of the first part, and the United States of America, party of the second part.

Witnesseth, that the parties of the first part hath, for good and sufficient consideration, remised, released and quit-claimed unto the United States of America all the right, title, claim and interest which they and each of them have in and to the following described piece, parcel or tract of land lying, being and situate in the County of Las Animas, State of Colorado, to wit.: The Southwest quarter of the Northeast quarter of section five (5), (S. W. ¼ of N. E. ¼) Township thirty-three (33) South of Range sixty-three West

JOHN HALLUM. [SEAL.]
JOSEPHINE FARNSWORTH [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]

---

STATE OF ARKANSAS, } *ss.*
*Lonoke County.* }

This day personally appeared before the undersigned, Clerk of the Circuit Court of Lonoke County, Ark., John Hallum, to me well known to be one of the parties grantor in the foregoing relinquishment to the United States, and he acknowledged before me that he had signed, sealed and delivered the same to the United States for the uses and purposes therein set forth, and I so certify.

Given under my hand and official seal of office this the 26th day of July, A. D. 1880.

[L. S.] WM. GOODWIN,
*Clerk.*

CITY OF ST. LOUIS, }
*State of Missouri.* } *ss.*

This day personally appeared before me, the undersigned, a notary public within and for the City of St. Louis and State of Missouri, Josephine Farnsworth, to me well known to be one of the parties grantor in the foregoing relinquishment to the United States, and she acknowledged before me that she had signed, sealed and delivered the same to the United States for the uses and purposes therein set forth, and I so certify.

My Notarial commission expires April 30th, 1881.

Given under my hand and official seal of office this 28th day of July, 1880.

[L. S.]

ENRIQUE PARMER,
*Notary Public.*

---

STATE OF COLORADO, }
*Las Animas County* } *ss.*

This day personally appeared before me, the undersigned, a notary public within and for the County of Las Animas and State of Colorado, Thomas Leitensdorfer, to me well known to be one of the parties grantor in the foregoing relinquishment to the United States, and he acknowledged before me that he had signed, sealed and delivered the same to the United States for the uses and purposes therein set forth, and I so certify.

Given under my hand and official seal this 31st day of July, A. D. 1880.

[L. S.]

WILLIAM R. WALKER,
*Notary Public.*

## Exhibit 51.

For good, *bona fide* and valuable consideration to us in hand paid by Jesus Ma Garcia, of the County of Las Animas and State of Colorado, we, the undersigned, John Hallum, Josephine Farnsworth and Thomas Leitensdorfer, do here by relinquish and quit claim unto the United States of America, all the right, title, claim, and interest of every nature whatever which we, or either of us, have in and to the certain piece, parcel or tract of land lying, being and situate in the County of Las Animas, in the State of Colorado, and in the Pueblo Land District, described as follows, to wit: The S. ½ N. E. ¼ S. 7, S. W. ¼ of N. W. ¼ of Section 8, in Township 33 S. of Range 63 W., 6th P. M., it being a part of the derivative of Thomas Leitensdorfer under the original grantees Vigil and St. Vrain to the Las Animas Grant.

Witness our hands and seals this 10th day of December, A. D. 1881.

[SEAL.] JOHN HALLUM,
JOSEPHINE FARNSWORTH,
THOMAS LEITENSDORFER.

Witness:
W. R. WALKER.

---

STATE OF COLORADO, }
*County of Arapahoe.* } *ss.*

I, Sam S. Landon, a notary public in and for said county in the State aforesaid, do hereby certify that John Hallum, personally known to me to be the person whose name is subscribed to the annexed relinquishment, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of December, A. D. 1881.

[SEAL.]

SAM. S. LANDON,
*Notary Public.*

---

CITY OF ST. LOUIS, }
*State of Missouri,* } *ss.*

I, Enrique Parmer, a notary public within and for the City and State aforesaid, do hereby certify that Josephine Farnsworth, personally known to me to be the same person whose name is subscribed to the annexed relinquishment, appeared before me this day, in person, and acknowledged that she signed, sealed and delivered the said instrument of writing as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of December, A. D. 1881.

My term expires June 26th, 1885.

[SEAL.]

ENRIQUE PARMER,
*Notary Public.*

---

STATE OF COLORADO, }
*Las Animas County.* } *ss.*

I, W. R. Walker, a notary public within and for the County and State aforesaid, do hereby certify that Thomas Leitensdorfer, personally known to me as the person who signed, sealed and delivered the said instrument of writing, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Witness my hand and notarial seal this 23rd day of December, A. D. 1881.

[L. S.] WILLIAM R. WALKER,
*Notary Public.*

[ENDORSED.]

STATE OF COLORADO, }
*County of Las Animas.* } *ss.*

I hereby certify that this instrument was filed for record in my office at 2 o'clock P. M. December 24th, A. D. 1881, and duly recorded in Book 10, page 706, Land Records of Las Animas County, Col.

[L. S.] JESUS MA. GARCIA,
*Co. Clerk.*
By P. C. CHACON,
*Deputy.*

---

## Exhibit 52.

For good, *bona fide*, and valuable consideration to us in hand paid by Jose Andres Salazar, of the County of Las Animas and State of Colorado, we, the undersigned, John Hallum, Josephine Farnsworth and Thomas Leitensdorfer, do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interest of every nature whatever, which we, or either of us, have in and to the certain piece, parcel, or tract of land lying, being, and situate in the County of Las Animas, in the State of Colorado, and in the Pueblo Land District, described as follows, to wit:

The S. W. ¼ N. E. ¼ S. 18, Tp. 33, S. R. 63 W., of the 6th Principal Meridian, it being a part of the derivative

claim of Thomas Leitensdorfer, under the original grantees, Vigil and St. Vrain to the Las Animas Grant.

Witness our hands and seals this 26th day of November, A. D. 1881.

JOHN HALLUM. [SEAL].
THOMAS LEITENSDORFER. [SEAL].
JOSEPHINE FARNSWORTH. [SEAL].

---

STATE OF COLORADO, }
*County of Las Animas.* }

I, William R. Walker, a notary public in and for said County, in the State aforesaid, do hereby certify that John Hallum and Thomas Leitensdorfer, personally known to me to be the persons whose names are subscribed to the annexed relinquishment, appeared before me this day, in person, and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 26th day of November, A. D. 1881.

[NOTARIAL SEAL.] WILLIAM R. WALKER,
*Notary Public.*

---

CITY OF ST. LOUIS, }
*State of Missouri.* } *ss.*

I, Enrique Parmer, a notary public, within and for the City and State aforesaid, certify that Josephine Farnsworth, personally known to me to be the person whose name is subscribed to the within relinquishment, appeared before me this day in person, and acknowledged that she signed, sealed and delivered the said instrument of writing as her

free and voluntary act for the uses and purposes therein set forth. Term expires June 26th, 1885.

Given under my hand and notarial seal this 30th day of November, A. D. 1881.

[NOTARIAL SEAL.] ENRIQUE PARMER,
*Notary Public.*

ENDORSED:

*John Hallum et al. to Jose Andres Salazar.*

---

STATE OF COLORADO,
*County of Las Animas.* } *ss.*

I hereby certify that this instrument was filed for record in my office at 10:25 o'clock A. M., December 20th, A. D. 1881, and duly recorded in book 10, page 702, Land Record.

[SEAL.] JESUS MA. GARCIA, *Recorder*,
PEDRO C. CHACON, *Depy.*

(Fees, $1.50.)

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## Exhibit 53.

For good, *bona fide* and valuable consideration to us in hand, paid by Jesus Ma. Garcia of the County of Las Animas and State of Colorado, we, the undersigned, John Hallum, Josephine Farnsworth and Thomas Leitensdorfer, do hereby relinquish and quit-claim unto the United States of America, all the right, title, claim and interest of every nature whatever which we or either of us have in and to the certain peice, parcel, or tract of land, lying, being and situate in the County of Las Animas, in the State of Colorado, and in the Pueblo Land District, described as follows,

to wit: The S. ½, N. E. ¼, S. 7, S. W. ¼ of N. W. ¼ of S. 8, in Township 33, S. of Range 63 W., 6th P. M., it being a part of the derivative of Thomas Leitensdorfer under the original grantees, Vigil & St. Vrain, to the Las Animas Grant.

Witness our hands and seals this 10th day of December, A. D. 1881.

Witness:
W. R. WALKER.

JOHN HALLUM, [SEAL.]
JOSEPHINE FARNSWORTH,
THOMAS LEITENSDORFER,

---

I, Sam S. Langdon, a notary public, in and for said County in the State aforesaid, do hereby certify that John Hallum, personally known to me to be the person whose name is subscribed to the annexed relinquishment, appeared before me this day, in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 10th day of December, A. D. 1881.

[NOTARIAL SEAL.] SAM. S. LANDON,
*Notary Public.*

---

CITY OF ST. LOUIS, } *ss.*
*State of Missouri.* }

I, Enrique Parmer, a notary public within and for the City and State aforesaid, do hereby certify that Josephine Farnsworth, personally known to me to be the same person whose name is subscribed to the annexed relinquishment, appeared before me this day, in person, and acknowledged that she signed, sealed and delivered the said instrument of

writing as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of December, A. D., 1881.

My term expires June 26th, 1885.

ENRIQUE PARMER,
*Notary Public.*

[NOTARIAL SEAL.]

---

STATE OF COLORADO, } *ss.*
*Las Animas County.* }

I, W. R. Walker, a notary public within and for the County and State aforesaid, do hereby certify that Thomas Leitensdorfer, personally known to me as the person who signed, sealed and delivered the said instrument of writing appeared before me this day, in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free voluntary act, for the uses and purposes therein set forth.

Witness my hand and notarial seal this 23rd day of December, A. D., 1881.

WILLIAM H. WALKER,
*Notary Public.*

[NOTARIAL SEAL.]

---

[ENDORSED.]

STATE OF COLORADO, } *ss.*
*County of Las Animas.* }

I hereby certify that this instrument was filed for record in my office at 2 o'clock, P. M., December 24th, A. D., 1881, and duly recorded in book 10, page 706, Land Records of Las Animas, County, Col.

JESUS MA. GARCIA,
*Co. Clerk.*

By P. C. CHACON,
*Deputy.*

[SEAL.]

23-189

# Supreme Court of the United States.

OCTOBER TERM, 1886.

WILLIAM CRAIG, *Appellant*,

*vs.*

THOMAS LEITENSDORFER, *Appellee.*

No. 2.

*Appeal from the Circuit Court of the United States for the Eighth Circuit, and District of Colorado.*

## CONTENTS:


Page.

Statement of the Case, . . . . . 1

### Argument.

I. The court below had jurisdiction of this case, . . 16

II. The court below had power to grant the relief sought and thereby remove the cloud from Leitensdorfer's title, . 18

III. Leitensdorfer had a right to sue independently of the department of justice, . . . . . 25

IV. Leitensdorfer, being a derivative claimant under the act of 25 February, 1869, (15 stat., 275,) had sufficient interest to maintain this suit, . . . . . 32

V. Leitensdorfer's sale to Allen, *pendente lite*, did not cause this suit to abate, . . . . . 42

VI. The decisions of the register and receiver for Craig and against Leitensdorfer are not final, and Leitensdorfer's appeal from those decisions, now pending before the commissioner, should be tried, . . . . . 45

VII. The President had no power to review the final, deliberate decision of the secretary sustaining the commissioner's appellate jurisdiction, and no power to award the title to Craig, and that title was void, . . . . . 54

VIII. If the president had a right to interfere, his action may be reviewed by the judiciary for errors of law, . . 68

IX. Craig's vendee's are buyers *pendente lite*, and will be bound by an affirmance of the decree below against him; and, on the whole case, *that decree should be affirmed*, . . 71


## Brief for Appellee.


ROBERT H. BRADFORD,
CHARLES W. HORNOR,
*Counsel.*

writing as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 14th day of December, A. D., 1881.

My term expires June 26th, 1885.

ENRIQUE PARMER,
*Notary Public.*

[NOTARIAL SEAL.]

---

STATE OF COLORADO, } *ss.*
*Las Animas County.* }

I, W. R. Walker, a notary public within and for the County and State aforesaid, do hereby certify that Thomas Leitensdorfer, personally known to me as the person who signed, sealed and delivered the said instrument of writing appeared before me this day, in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free voluntary act, for the uses and purposes therein set forth.

Witness my hand and notarial seal this 23rd day of December, A. D., 1881.

WILLIAM H. WALKER,
*Notary Public.*

[NOTARIAL SEAL.]

---

[ENDORSED.]

STATE OF COLORADO, } *ss.*
*County of Las Animas.* }

I hereby certify that this instrument was filed for record in my office at 2 o'clock, P. M., December 24th, A. D., 1881, and duly recorded in book 10, page 706, Land Records of Las Animas, County, Col.

JESUS MA. GARCIA,
*Co. Clerk.*

By P. C. CHACON,
*Deputy.*

[SEAL.]

23-189

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VIII. If the president had a right to interfere, his action may be reviewed by the judiciary for errors of law, . . 68

IX. Craig's vendee's are buyers *pendente lite*, and will be bound by an affirmance of the decree below against him; and, on the whole case, *that decree should be affirmed*, . . 71


## Brief for Appellee.


ROBERT H. BRADFORD,
CHARLES W. HORNOR,
*Counsel.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1886.

WILLIAM CRAIG, *Appellant*,

*vs.*

THOMAS LEITENSDORFER, *Appellee.*

No. 2.

*Appeal from the Circuit Court of the United States for the Eighth Circuit, and District of Colorado.*

## Brief for Appellee.

### STATEMENT OF THE CASE.

By the act of 21 June, 1860, s. 1, (12 Stat., 71,) the claim of Cornelio Vigil and Ceran Saint Vrain, for about 922 square leagues, was confirmed for 22 square leagues, or 97,650.96 acres, lying near Trinidad, in the southern part of the present state of Colorado. They had sold much more than the quantity so confirmed, and the distribution among their grantees, of the land confirmed, devolved, by act of 25 February, 1869, s. 1, (15 stat., 275, 440,) and joint resolution of 28 April, 1870, (16 stat., 373, 663,) on the register and receiver at Pueblo, Colorado, to whose satisfaction the act required the grantees to establish their claims and settlements. About 39 claimants presented their claims to the land officers, and among them was the claim of Leitensdorfer, one of the earliest grantees of Vigil and Saint Vrain, for 16,000 acres, and the subsequent claim of Craig for 127,000 acres. Craig, by bribery and fraud, as alleged, obtained a decision in his favor for 73,251.55 acres, which, with favorable decisions for 12 other claimants, absorbed all the land confirmed. Leitensdorfer's claim was rejected, and he appealed to the general land office,

with other rejected claimants. While these appeals were pending, Craig, who had joined issue with Leitensdorfer before the bureau, took his claim before the president, who, on the advice of attorney general Pierrepont, ordered that title should issue to Craig. This was done. The government issued to him a title in fee for all the land allowed him by the register and receiver, thus completing the appropriation of all the land confirmed, and rendering nugatory the appeals of Leitensdorfer and others, which are still pending before the commissioner. Leitensdorfer then filed a bill, in the court below, to annul Craig's title as a cloud on his own. The court found Craig's title to be fraudulent and void, and accordingly granted a decree annulling it. Craig then brought this appeal.

The specific facts of the case are these:

Under the Mexican colonization act of 18 August, 1824, and the ensuing executive regulations of 21 November, 1828, (1 Rockwell's Spanish and Mexican Law, 452 *et seq.*,) Cornelio Vigil, a Mexican, and Ceran Saint Vrain, a naturalized Mexican, at Santa Fé, on the 9 December, 1843, got from Manuel Armijo, then governor and commanding general of the Mexican state of New Mexico, through his secretary, Donaciano Vigil, an order requiring those applicants to be placed in juridical possession of a large tract of land; (transcript, 249; translated on p. 252;) for the Mexican law, like the common law, made formal livery of seisin in public grants of land, essential to investiture of title. (Malarin *vs.* U. S., 1 Wallace, 282, 289; Graham *vs.* U. S., 4 *ib.*, 259.) On the 2 January, 1844, Miguel Sanchez, justice of the peace of the 3d demarcation of the district of Taos, in that state, accordingly fixed mounds around the tract, put the applicants in juridical possession of the whole, and granted a certificate and eye-draft of his operations. (Transcript, 250; translated on p. 253. See eye-draft opposite, p. 347.) The lines were not run or marked. Indeed, the inchoate grant has never been surveyed by authority. The tract thus delivered covers parts of Las Animas, Bent, Huerfano, and Pueblo counties, in southern Colorado, and extends from the Arkansas river in front, to the grant of Beaubien and Miranda behind, and from the valley of the Las Animas or Purgatoire tributary of the Arkansas, below, to within half a league of the San Carlos tributary, above, and contains about 80 miles square, or 922 square leagues, or 4,096,345 acres. (Transcript, 253, 402, and eye-draft.)

The applicants for this tract did not accompany their application with the usual *deseno*; nor was the application referred by the governor to the alcalde or any other officer, for a report as to the qualifications of the applicants, the vacancy of the land, and the possible injury which might result to the government or third parties, from the grant; nor was such report made by any officer; nor was there any preliminary concession or ultimate

grant by the governor; nor were any of the proceedings in the case referred to the departmental assembly or to the Mexican congress, or considered by either.

On the 7 March, 1844, at Taos, the grantees, Vigil and Saint Vrain, executed a donation of $\frac{1}{6}$ of their inchoate grant to Eugene Leitensdorfer, under whom appellee holds, (Transcript, 287,) and a like donation of $\frac{1}{6}$ of the grant to Manuel Armijo. (*Id.*, 170.)

On the 11 March, 1844, at Taos, they executed another donation of $\frac{1}{6}$ of the grant to Carlos Bent; (*Id.* 168;) and in the same year they executed a like donation of $\frac{1}{6}$ of the grant to Donaciano Vigil. (Transcript, 291.) So that, in 1844, as thus appears, $\frac{1}{6}$ of the grant was vested in each person mentioned, namely, Cornelio Vigil, Ceran Saint Vrain, Eugene Leitensdorfer, Manuel Armijo, Charles Bent and Donaciano Vigil. Under these 6 men, all of the derivative claimants, who presented their titles afterwards to the land officers at Pueblo, hold, or allege that they hold, their specific tracts, tho' no formal partition of the grant has ever been made. The earliest link in the chain of appellant's title, is a deed of 15 April, 1859, from Reyes Baca, widow of Cornelio Vigil, to Meril Ashurst and Robert P. Kelly. (Transcript, 195.)

Eugene Leitensdorfer had begun mercantile life at Santa Fe, about 1836, and in 1843 was staying with Charles Bent, and other parties to the above division, at Bent's Fort, on the left bank of the Arkansas, opposite the grant. (Transcript, 288, 291.) The fort was then a trading post, and William Bent and Ceran Saint Vrain were partners in the post. (Kit Carson's evidence, transcript, 255. His testimony is in the general land office; but he is dead. See reference to his children, Transcript, p. 281, 282, and to his estate, p. 373, claim 187. He was dead by 20 April, 1870, p. 367.) In 1846, Charles Bent and Eugene Leitensdorfer had an agent in possession of part of the grant on the Las Animas river, where the agent then lived; but he left in the winter of 1846–7 on account of the Indians. (Transcript, 298.)

By article V of the treaty of 2 February, 1848, between the U. S. and Mexico, (9 stat., 922,) the region embracing this grant became the property of the United States, tho' by article VIII the property of the inhabitants remained unchanged. The act of 9 September, 1850, (9 stat., 446,) created the territory of New Mexico, which included nearly the whole grant. Section 17 of the act extended our federal constitution and laws to the territory. The statute became operative by the executive proclamation of 13 December, 1850. (9 stat., 1005.) Section 8 of the act of 22 July, 1854, (10 stat., 308,) establishing the office of surveyor general of New Mexico, required him to report all claims to land, originating before the treaty, with his decision on each,—the whole to be laid before congress for such action as might be deemed just.

On the 21 August, 1854, the commissioner of the general land office, in the exercise of his large powers of supervision, prepared full instructions, under the above act, to the surveyor general, and they were approved by the secretary of the interior. (Transcript, 239, 247; Land Office Report, 1871, p. 65.) The claim of Vigil and Saint Vrain for the whole grant, was, on the 4 June, 1857, filed before the surveyor general, (transcript, 257,) who, on the 30 September, 1857, submitted to the commissioner the report required. (*Ib.*, 247.) In that report the claim is numbered 53,—afterwards changed to No. 17. (*Ib.*, 360.) The surveyor general decided in its favor. The general, public, confirmatory act of 21 June, 1860, (12 stat., 71,) confirmed the claim by way of relinquishment for not more than 11 square leagues to each of the 2 grantees, (equal, at 4,438.68 acres to the league, to 97,650.96 acres in all,) declaring that the survey should first be made of all tracts occupied by actual settlers, holding possession under titles or promises to settle given by Vigil and Saint Vrain; and that the rest of the 22 leagues should after that be located for those grantees, respectively, in two equal tracts, in any part of the grant which they should select. By act of 28 February, 1861, the territory of Colorado, which seems to have embraced all of the original grant, was created, and a surveyor general for the territory authorized. (12 stat., 172.) On the 15 May, 1867, (transcript, 258,) the general land office wrote him instructions for adjusting this claim, under act of 21 June, 1860, which statute contemplated no action by any register or receiver.

On the 25 February, 1869, congress, to effectuate the act of 21 June, 1860, and to disencumber the domain of this claim, (as reduced and confirmed by the act of 1860,) and of the vast, unconfirmed remainder of the grant, passed a general public act, (15 stat., 275, 440,) amending that of 21 June, 1860, and prescribing a short limitation for establishing the rights of the derivative claimants, and the hypothetical residuary rights of Vigil & Saint Vrain, under that confirmatory act. The act of 1869 is a statute of repose and elimination, not of confirmation. Its first section says:

"the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives prior to the passage of this act, who may establish their claims within one year from the passage of this act, to the satisfaction of the register and receiver of the proper land district," shall be adjusted according to subdivisional lines of survey, so as to include the lands so settled on or purchased. The acts of 1860 and 1869 seem to waive objection to the absence of a partition between Vigil and Saint Vrain and between their immediate grantees,

and to treat the derivative claimants rather as anomalous homesteaders than as confirmees, and to look more to their settlements than to their titles under Vigil and Saint Vrain. The acts, therefore, do not require those claimants to pay any costs of survey,—a burden imposed by section 2 of the act of 1869, on the original grantees, in case they should seek to avail themselves of the confirmation of 1860.

Section 3 of the act of 25 February, 1869, orders the surveyor general, on the adjustment of the 22 leagues confirmation according to the act, to furnish to the derivative claimants, and to the owners of the hypothetical residuum, proper approved plats, according to such instructions as might be given by the general land office; and declares that such plats "*shall be evidence of title.*" On these plats the holders might, possibly, in their option, demand patents eventually under R. S., § 2447,—a provision which supersedes the corresponding act of 22 December, 1854, 10 stat., 599. Section 5 of the act of 1869 provides that if Vigil or Saint Vrain should neglect to accept its provisions, or those of the act of 1860, and to locate his half of the supposed residue of the 22 leagues, no proceedings should be instituted in any of the courts of the United States by such delinquent, or any one claiming under him, to enforce his claim, or any cause of action founded on it, after 6 months from the passage of the act of 25 February, 1869. The time of a year from the passage of that act, allowed for the presentation of the derivative claims of actual settlers, was, by general, public, joint resolution of 28 April, 1870, extended to a year from the approval of the subdivisional surveys involved, (16 stat., 373, 663,) a limitation which expired on the 24 Feb'y, 1873. (Transcript, 188.)

The preferred claims of the actual settlers, holding under derivative titles from Vigil or Saint Vrain, or from both, greatly exceed the 22 leagues confirmed by the act of 1860, and the claims allowed by the register and receiver about equal 22 leagues. (Transcript, 186, 185.) For this reason, and because neither of those grantees, or any representative of his assumed residuary interest, has ever refunded any of the costs of survey, as contemplated by section 2 of the act of 1869, (transcript, 406,) or made the selection and location contemplated by section 4 of the act within the time limited, (transcript, 269,) or brought suit to establish the original grant, or any part of it, as allowed by section 5 of the act, the confirmation, as to those delinquents, has not become "legally effective," (transcript, 406,) in the words of section 2, and all pretence of title in them is barred and void. (See Colorado Co. *v.* Commissioners, 95 U. S., 259, 265.)

The act of 1869 is the hinge of this case.

Under act of 21 June, 1860, the surveyor general of Colorado, on the 20 April, 1870, reported to the general land office about

fore secretary Delano in person. A decision was rendered, on 23 January, 1875, technically refusing the motion, but really and elaborately sifting the whole question of the commissioner's revisory power, and affirming that power and the secretary's previous decision. This second decision also eviscerates the Mexican grant to Vigil and Saint Vrain, and the legislation upon it. (1 Copp's Land Owner, 165; Copp's Public Land Laws, 611, ed. of 1875; transcript, 401.) These final, deliberate decisions, being within the secretary's jurisdiction, as invoked by Craig, could not be impaired by his successors or by any authority short of the judicial power, and *do yet bind the executive department.*

But, about the 25 May, 1875, Craig informally appealed to the president from the secretary's second decision, and also asked the president for an order directing that the surveyor general of Colorado be required to issue a plat of Craig's land, in accordance with the register and receiver's decision. (15 Opinions of attys. genl., 94.) There was no motion, petition, or order for this appeal. No transcript of appeal was filed; but Craig's case was presented to the president *ex parte*, on Craig's own statement to the commissioner of 1 October, 1874, (*Ib.*, 95; transcript, 347,) *without the knowledge or consent of the secretary, the commissioner, or any of the opposing parties or counsel,* at the time. Afterwards, the president referred Craig's statement to attorney general Edwards Pierrepont, for an opinion as to "whether the Executive should take action upon the matter set forth in the letter of Colonel Craig to Hon. S. S. Burdett, Commissioner of the General Land Office, dated October 1, 1874, after the decision of the Secretary of the Interior in this case, and, if so, what action would be recommended." (15 Opinions, 94.)

After argument *pro* and *con*, the attorney general, on the 15 May, 1876, in an opinion expressly adopting the *ex parte* allegations of Craig's letter, and ignoring Leitensdorfer's claim, advised the president that no appeal lay to the commissioner from the register and receiver's decision for Craig; that the secretary had no jurisdiction to review the decision; that the president's action could be lawfully invoked in the case; and that the president, accordingly, ought to direct the commissioner to instruct the surveyor general of Colorado to deliver to Craig an approved plat of the land adjudged to him by the decision of the register and receiver. The attorney general also said: "It is not suggested that the decision of the register and receiver was fraudulent or corrupt." (15 Opinions of Attorneys General, 94, 104.) Truly the wicked flee when no man pursueth!

After this opinion reached the president, it was referred to the interior department. Secretary Zachariah Chandler, who had succeeded Mr. Delano, referred the opinion to the general land office, and the commissioner, on the 29 July, 1876, rendered to

the secretary a thorough report, opinion and statement of facts, maintaining the revisory power of the commissioner over the decisions of the register and receiver, and denying the president's power to review secretary Delano's final decision sustaining such revisory power of the commissioner. (Transcript, 174.) Thus the case rested till Friday, the 2 March, 1877, two days before the inauguration of Mr. Hayes, when president Grant, on the *ex parte* application of Craig, without notice to Leitensdorfer or his counsel, and without a report from secretary Chandler, issued the following order to enforce attorney general Pierrepont's advice of 15 May, 1876:

"*In the matter of William Craig, owner of certain lands in Las Animas grant, Colorado.*

"In accordance with the opinion and recommendation of the Attorney General upon the questions submitted to him, the Commissioner of the General Land Office is directed to instruct the Surveyor General of Colorado to deliver to Colonel William Craig an approved plat of the land adjudged to him by the register and receiver of the Pueblo land district, in the State of Colorado, dated February 23d, 1874. If, in the opinion of the Commissioner of the General Land Office and the Secretary of the Interior, the amount of land owned by William Craig is less than that heretofore awarded, then the order upon the surveyor general of Colorado may be for the amount of land deemed due him.

"U. S. GRANT.

"EXECUTIVE MANSION, *March 2d*, 1877."

(Transcript, 228–9; 1Decisions of Dept. and Gen'l L. O., 276, 277.)

The Commissioner, on the 7th March, 1877, wrote the surveyor general of Colorado, instructing him to prepare a plat of the land specifically awarded by the register and receiver to Craig. (Recited in plat opposite, p. 234 of Transcript.) On the 9th March, 1877, Secretary Chandler, then holding over till his successor shall appear and qualify, approved these instructions. (Recited in Transcript, 228.) Upon Leitensdorfer's written application of 16th March, 1877, to Secretary Carl Schurz, Mr. Chandler's successor, to review these summary proceedings, so injurious to Leitensdorfer, he referred the matter to attorney general Chas. Devens, who, on the 20th March, 1877, gave his opinion that the official acts of the late administration, in this case, could not be reviewed by the executive department of the succeeding administration. (15 Opinions, 208, and see Answer, Trans., p. 66.)

Is it possible that Craig's policy in getting his order from President Grant two days before the change of administration,

was intended to defeat a review of the case by the outgoing administration for want of time, and a review by the incoming administration for want of jurisdiction?

As Leitensdorfer was thus denied relief before the executive department, and as he and the other appealing derivative claimants before the commissioner had no plain, adequate, or complete remedy at law to restrain the delivery of Craig's plat and the injurious consequences which would result from such delivery, he filed in the court below, on the 4 May, 1877, a bill in equity against Craig and the surveyor general, reciting, in substance, the above facts, and praying for an injunction against those parties to restrain the delivery of the plat to Craig, till the appeals of Leitensdorfer and the other derivative claimants, pending before the commissioner, should be tried and finally adjudged on their merits, under the secretary's direction, according to law, and until it should appear, by such final judgment, that Craig is entitled to a plat as evidence of title. (Transcript, 1.) A temporary injunction issued accordingly on the 21 May, 1877, conditioned that Leitensdorfer, within 30 days, should begin proceedings in the proper court of the District of Columbia, for an order on the commissioner to hear and decide the appeal of Leitensdorfer from the decision of the register and receiver. (Transcript, 25.)

Accordingly, on the 19 June, 1877, Leitensdorfer, in the name of the United States, filed his petition in the supreme court of the District of Columbia, for a mandamus against James A. Williamson, then commissioner, to compel him to try the appeals of Leitensdorfer and the other appealing derivative claimants. (Affidavit of Robt. H. Bradford, transcript, page 30.)

After agument *pro* and *con*, David C. Humphreys, an associate justice of the court, dismissed the motion for the rule on the commissioner, on the 3 July, 1877. (See Craig's answer, Transcript, 67.) It seems that the opinion of Justice Humphreys has not been reported.

On the 13 July, 1877, on trial of a demurrer filed by Craig and the surveyor general to Leitensdorfer's bill, the court below, without dismissing the bill, dissolved the temporary injunction obtained by Leitensdorfer, with leave to file an amended and supplemental bill within 90 days. (Transcript, 31.) The decision, rendered by Justice Miller of this court, Hallett concurring, proceeded on the ground that it was not competent for the judiciary to interfere till the executive had exhausted its powers by issuing final title to Craig, (recited, Leitensdorfer *v.* Campbell and Craig, 5 Dillon C. C. reports, 419,) though the prime object of Leitensdorfer in filing his bill was to enable the interior department to proceed with the trial of the appeals from the register. This dissolution of the temporary injunction of course dissolved, also,

the condition on which it had been granted, namely, the prosecution of the superfluous action against Commissioner Williamson.

Meantime, on the 26 May, 1877, William L. Campbell, the surveyor general, after service of the injunction, had approved and signed the plat of Craig's claim for the area allowed by the register and receiver, and, on the 7 June, 1877, Commissioner Williamson had also approved and signed it. (Transcript, 234, plat.) After the dissolution of the temporary injunction, the general land office delivered to Craig the plat, of which a duplicate original is, according to the custom in such cases, on file in the surveyor general's office at Denver. (Craig's answer, transcript, 68.)

Leitensdorfer, on the 6 October, 1877, filed in the circuit court his amended and supplemental bill, (transcript, 32,) alleging the bribery of the register and receiver by Craig; the extrinsic illegality of Craig's final titles and of the presidential order which they enforced; the fact that those titles left no land for the derivative claims of Leitensdorfer and other appellants before the commissioner, and precluded the trial of the appeals and were a cloud on the derivative claims of himself and the other appellants; that those titles, if left uncanceled, would cause irreparable mischief to him and the other appellants, and that he and they were only relievable in equity. The supplemental bill therefore prayed that Craig's plats might be decreed void; that he might be enjoined from prosecuting any suit in law or equity on those plats; that he, and the surveyor general and successors, might be ordered, within a time limited, to deliver the plats in court, and that the plats might be then canceled. The bill ended with the usual prayer for general relief. After this, on the 8 January, 1878, a quit claim patent issued to Craig for the land allowed him by the register and receiver, (transcript, 229,) under color of R. S., § 2447, (*ib.*, 234; 1 decisions of Dep't and Gen'l L. O., 276, 277,) and was "delivered to Col. Wm. Craig, Washington, D. C., Jan'y 11, 1878." (Transcript. 228.)

The surveyor general and Craig demurred to the supplemental bill, (transcript, 52, 54,) and the court, by justice Dillon, Hallett concurring, sustained the surveyor general's demurrer on the ground that he had been improperly made a defendant, but overruled Craig's demurrer with leave to answer. (Transcript, 56.) The opinion, which was rendered on the 6 July, 1878, is in 5 Dillon's C. C. reports, 419,—Leitensdorfer *v.* Campbell *v.* Craig. It intimates that Leitensdorfer has the right of appeal to the commissioner from the decisions of the register and receiver against him and in favor of Craig; that the secretary of the interior has jurisdiction to review those decisions, and that while Craig's plats were in force, it was out of the power of the commissioner or secretary to hear Leitensdorfer's appeals.

By an amendment to the bill and the supplemental bill, filed on the 8 August, 1878, the allegation of the bribery of the register and receiver was made more specific. (Transcript, 56, 57.)

Craig filed his answer on the 7 October, 1878. (Transcript, 58.) After considering the original and amended bills, the answer, proofs and arguments, James M. Love, district judge of the Iowa district, assigned to sit in the Colorado district, rendered a final decree in this case on the 2 July, 1880, as follows:

"It is therefore ordered, adjudged and decreed, that the decision or award of the register and receiver of the lands described in the bill and pleadings of date the 23d of February, 1874, in favor of defendant, Wm. Craig, is fraudulent and void.

"And it is further ordered, adjudged, and decreed that the patent for the said lands issued to defendant, Wm. Craig, on the 8th day of January, 1878, be, and it is hereby, declared and decreed to be null and void, and that the approved plat or plats delivered to defendant, Wm. Craig, as evidence of title to the land described in the bill by Wm. Campbell, surveyor general, be, and the same are hereby, declared and decreed to be null and void." (Transcript, 471.)

The decree omitted to order the surrender and cancellation of the instruments annulled by it, tho' prayed for in the supplemental bill. (*Id.*, 50.) It seems the final opinion of the circuit court is not reported.

The court, on the 5 October, 1880, granted Craig an appeal, as of the 2 July, 1880, from this decree, returnable here on the first day of the October term, 1880; (transcript, 472;) but, on the 16 January, 1882, as he had not filed the record here, the case (No. 1193 on the docket of October term, 1881,) was, on Leitendorfer's motion, docketed and dismissed under rule 9. Craig, on the 6 May, 1882, was allowed a second appeal by the court below, on giving bond in the sum of $500, (transcript, 474,) and on the 6 October, 1882, he accordingly filed the transcript here.

On the 7 January, 1884, a motion before this court, of Mrs. Leann S, King, (who alleged an interest in the derivative claim of Thomas Leitensdorfer, as buyer, at sheriff's sale, of the lands embraced in it,) to be substituted for Leitensdorfer, was denied; but the court granted an order permitting her counsel to file printed arguments on the final hearing of this cause, or on any motions made in its progress which may be supposed to affect her interests.

On Monday, 4 May, 1885, in the last moments of the term, Benjamin F. Butler, of counsel for Craig, made a motion to enforce the following stipulation, filed at the same time:

"SUPREME COURT OF THE UNITED STATES.

"October term, 1884.

"WILLIAM CRAIG, Appellant,
*vs.*
"THOMAS LEITENSDORFER, Appellee. } In Equity, No. 310.

"And now come the parties above named and stipulate and agree together, that by their mutual consent the decree of the Circuit Court from which this appeal is taken be reversed and the cause remanded to that Court with directions that a decree be entered 'Bill dismissed without costs.'

"BENJ. F. BUTLER, *for Appellant.*
"JOHN HALLUM, *for Appellee, and*
"*att'y in fact for parties in Interest.*"

No *definitive* order was made on this motion, at the time; but on the 18 January, 1886, of the following term, the court, after various motions, &c., in the case, made this order:

"No. 48.—SUPREME COURT OF THE UNITED STATES.

"October Term, 1885.

"WILLIAM CRAIG, Appellant,
"*vs.*
"THOMAS LEITENSDORFER.

"*On motion to enter judgment in accordance with stipulation.*

"In this case it is ordered that the decree be reversed in accordance with an agreement to that effect entered into between Mr. Butler, of counsel for appellant, and Mr. Hallum, of counsel for the appellee, now on file, and that the cause be remanded with instructions to dismiss the bill without prejudice, unless the appellee, or some or all the persons who claim to have acquired title to the premises in dispute, or some part thereof, from or through him since the suit was begun, within thirty days from the entry hereof, file a stipulation in the cause, with security to the satisfaction of the Clerk, to pay all costs and expenses accruing on this appeal since the last term that may be finally adjudged against the appellee, including the cost of printing the record and the Clerk's fees for supervising.

"January 18, 1886."

Meantime, on the 10 April, 1882, Eugene Leitensdorfer and Thomas Leitensdorfer, by warranty deed, had conveyed to Thomas J. Allen, for $12,000 cash, the derivative claim of Thomas Leitens-

dorfer, and the deed was recorded in Las Animas county, Colorado, on the 14th of the month; and Josephine Farnsworth, on the 10 April,1882, had made a like conveyance to Allen, for $20,000 cash, and the deed was recorded in Las Animas county on the 26 May, 1882. (Exhibits S. and R., on pp. 11 and 13, of our "Answer to Motion of Appellant," filed in this court 31 October, 1885.)

On the 30 January, 1866, A. T. Britton, A. B. Browne and J. H. McGowan, counsel for the intervenor, Mrs. Leann S. King, withdrew their appearance for her.

The undersigned have regularly entered their appearance for, and filed authorizations from Thomas Leitensdorfer and Thomas J. Allen, and the latter has duly complied with the order of court requiring security for costs, by filing with the clerk a stipulation in the sum of $3,000, approved by the judge of the proper federal court. Mrs. Leann S. King has also filed a stipulation under that order.

On the , 1886, after these things were done, Thos. Leitensdorfer died; but we have not been able to learn with certainty the condition of his estate, or whether it is in process of administration. As, however, Allen had succeeded to all of his interest, according to the deed and testimony of Leitensdorfer, we submit that Leitensdorfer's death does not affect this suit. (*Ex parte* Railroad Co., 95 U. S., 221, 226, by chief justice Waite.)

As the derivative claims of Thomas Leitensdorfer and of the other appellants now pending before the general land office, must be adjudged there on their merits, after the obstruction resulting from the outstanding title to Craig shall have been removed, the prime object of Leitensdorfer was, not to get a decree from the courts establishing his own title, but simply to make out a *prima facie* case, and to maintain the appellate power of the commissioner, and to show that Craig's ultimate federal title should be declared void for illegality and fraud, and removed from the pathway of that appellate power.

The facts, law, area and value in Leitensdorfer's case are far-reaching, and the case, in its many phases, has often been considered by the courts and departments. Many of those authorities are unreported. Among the reported cases, &c., involving his claim, are the following:

Senate report of 19 May, 1860, by Mr. Benjamin, preliminary to the confirmatory act of 21 June, 1860. (Transcript, 360; Repts. of Comm. on Private Land Claims of Senate and H. R. Sen. Misc. doc. 81, of 45th Cong., 3d sess.; part 1, p. 518.)

Senate report of 1 February, 1869, preliminary to act of 25 February, 1869, for the settlement of these derivative claims. (*Id.*, p. 532; transcript, 364.)

Secretary's decision of 27 October, 1874, sustaining the commissioner's appellate power. (Transc., 399; 1 Copp's Land Owner, 122.)

Secretary's decision of 23 January, 1875, eviscerating the grant to Vigil and Saint Vrain, and affirming his decision of 27 Oct., 1874. (Transc., 401; 1 Copp's Land Owner, 165, and Copp's Pub. L. Laws, 611.)

Atty. Genl. Pierrepont's opinion of 15 May, 1876, holding that the president should enforce the decision of the register and receiver for Craig, as final. (15 Opinions, 94.)

Atty. Genl. Devens' opinion of 20 March, 1877, that the acts of the preceding administration, in Craig's favor, could not be reviewed by the executive. (*Id.*, 208.)

Decision of 6 July, 1878, by justice Dillon, Hallett concurring, overruling Craig's demurrer to the supplemental bill. (Leitensdorfer *v.* Campbell & Craig, 5 Dillon's C. C. Repts., 419.)

Commissioner's report to the secretary, of 5 May, 1882, refering to the pending litigation, and asking instructions as to delivery of approved plats to derivative claimants. (1 Decisions of Dept. and Genl. Land O., 276.)

Secretary Teller to the commissioner, 12 June, 1882, giving the instructions requested above. (*Id.*, 278, and 9 Copp's Land Owner, 83, 103.)

Commissioner's decision of 27 June, 1883, denying Mrs. King's right to be substituted for Leitensdorfer before the genl. land office. (2 Decisions of Int. Dept. relating to Pub. Lands, 378.)

Commissioner's decision of 16 November, 1883, granting Mrs. King's appeal to secretary from decision of 27 June, 1883. (*Id.*, 374, and 10 Copp's Land Owner, 269.)

Decision of supreme court of Colorado, affirming judgment under which Mrs. King bought in Leitensdorfer's claim. 4 Pacific Reporter, (Saint Paul, Minn.,) 37.

Secretary's decision of 18 June, 1884, that the opinion of atty. genl. Pierrepont and order of the president against Leitensdorfer, control the department. (2 Decisions of Int. Dept. relating to Pub. Lands, 590.)

Secretary's decision of 15 September, 1884, affirming commissioner's decision of 27 June, 1883, against Mrs. King's right of substitution. (3 *id.*, 110.)

## Argument.

I. THE COURT BELOW HAD JURISDICTION OF THIS CASE.

II. THE COURT BELOW HAD POWER TO GRANT THE RELIEF SOUGHT AND THEREBY REMOVE THE CLOUD FROM LEITENSDORFER'S TITLE.

III. LEITENSDORFER HAD A RIGHT TO SUE INDEPENDENTLY OF THE DEPARTMENT OF JUSTICE.

IV. LEITENSDORFER, BEING A DERIVATIVE CLAIMANT UNDER THE ACT OF 25 FEBRUARY, 1869, (15 STAT., 275,) HAD SUFFICIENT INTEREST TO MAINTAIN THIS SUIT.

V. LEITENSDORFER'S SALE TO ALLEN, *pendente lite*, DID NOT CAUSE THIS SUIT TO ABATE.

VI. THE DECISIONS OF THE REGISTER AND RECEIVER FOR CRAIG AND AGAINST LEITENSDORFER ARE NOT FINAL, AND LEITENSDORFER'S APPEAL FROM THOSE DECISIONS, NOW PENDING BEFORE THE COMMISSIONER, SHOULD BE TRIED.

VII. THE PRESIDENT HAD NO POWER TO REVIEW THE FINAL, DELIBERATE DECISION OF THE SECRETARY SUSTAINING THE COMMISSIONER'S APPELLATE JURISDICTION, AND NO POWER TO AWARD THE TITLE TO CRAIG, AND THAT TITLE WAS VOID.

VIII. IF THE PRESIDENT HAD A RIGHT TO INTERFERE, HIS ACTION MAY BE REVIEWED BY THE JUDICIARY FOR ERRORS OF LAW.

IX. CRAIG'S VENDEES ARE BUYERS *pendente lite*, AND WILL BE BOUND BY AN AFFIRMANCE OF THE DECREE BELOW AGAINST HIM; AND, ON THE WHOLE CASE, THAT DECREE SHOULD BE AFFIRMED.

These points will be argued in their order.

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I. THE COURT BELOW HAD JURISDICTION OF THIS CASE.

The bill first filed sought to enjoin William L Campbell, U. S. surveyor general for Colorado, from delivering, and defendant Craig from receiving, an approved plat of Craig's claim. A temporary injunction issued, but on demurrer by those defendants it was dissolved, and leave was granted complainant to file an amended and supplemental bill. After the dissolution, Craig of course got his approved plats, and, on the 11th of January, 1878, after the filing of the supplemental bill, he personally received from the general land office, under color of R. S., § 2447, a quit claim patent in his own name, for the same land. (Transcript, 228, 234, &c.) The supplemental bill alleged that Craig's title, as issued by the U. S., was a cloud on the claim of Leitensdorfer,

who proved possession, (*id.*, 433,) and the bill therefore sought a decree annulling that title and ordering the surrender and cancellation of Craig's plat, and of its duplicate original then in the surveyor general's official custody. (*Id.*, 68, answer to bill.) The prayer of the supplemental bill for general relief, afterwards enabled the court to decree the nullity of the patent issued to Craig *pendente lite*. The surveyor general and Craig demurred to the supplemental bill, and the court dismissed the bill, as to the former, but sustained it as to Craig. (*Id.*, 56.) The first bill was never dismissed, and the supplemental bill is therefore part of the original suit.

It follows that if the court below had jurisdiction of the first bill, the jurisdiction must continue till the whole litigation shall have been finally disposed of. "Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief." (Ober *v.* Gallagher, 93 U. S., 199, 206, by Waite, C. J.; Story's Eq., 64 *k*; Ward *v.* Todd, 103 U. S., 327, 329, by Waite, C. J.) Now, it is clear that the circuit court had jurisdiction of this suit when instituted. The suit involves the primary disposal of the federal domain, the duties of the register and receiver and other federal officers, the application of the federal constitution to the duties of the president, and the construction of federal treaties and federal statutes; and it does not involve any consideration of state officers, the state constitution, or state laws. The injunction was intended to restrain the U. S. surveyor general from delivering a title, and would have been futile had he not been made a party. The supplemental bill properly made him a party, for otherwise, after the surrender and cancellation of the plat issued to Craig, the surveyor general might grant him the duplicate original in that officer's custody, and so the injury which that bill seeks to cure might be perpetuated. The surveyor general, therefore, was a proper party, not a nominal party. But the arm of a state court is not long enough or strong enough to reach him. In McClung *v.* Silliman, involving the disposal of a tract, once part of the public lands of the U. S., this court said: "The question in this case is, as to the power of the state courts over the officers of the general Government, employed in disposing of that land, under the laws passed for that pupose. And here it is obvious that he is to be regarded either as an officer of that Government, or as its private agent. In the one capacity or the other, his conduct can only be controlled by the power that created him," &c. (6 Wheat., 598, 604.)

That was a case of mandamus against a register; but in principle it applies to this case, or to any case where a court is asked to control the official action of federal officers in the primary disposal of the federal domain.

If the surveyor general had never been a party to this suit, still the circuit court would have had jurisdiction, not *ratione personarum*, for all the parties lived in Colorado, but *ratione materiae*. The constitution, in article III, section 2, declares that "The judicial Power shall extend to all Cases in Law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" and the same section provides that, in those cases, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Congress has vested jurisdiction of these cases in the circuit courts, by act of 3 March, 1875, sec. 1, which enacts "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," &c. (18 stat., 470.) Here the matter in dispute is the derivative claim of Leitensdorfer or Craig, either of which much exceeds $500 in value. (Transcript, 13, 433, 63.) If *Leitensdorfer's* claim is the matter in dispute, which we deny, and its value does not exceed $5,000, exclusive of costs, this court has no appellate jurisdiction, (act 16 February, 1875, s. 3, 18 stat., 315,) and the court will dismiss Craig's appeal, of its own motion. The case arises under the act of congress of the 25th of February, 1869, and other acts of congress, and seeks to avoid a title expressly and personally authorized by the president, on the ground that he violated the law in causing it to issue. It is hard to imagine a case more appropriate for federal judicial cognizance than this. And if the case be of federal cognizance, of course the circuit court was the right forum in which to present it.

II. THE COURT BELOW HAD POWER TO GRANT THE RELIEF SOUGHT, AND THEREBY REMOVE THE CLOUD FROM LEITENSDORFER'S TITLE.

Craig's plat and patent leave no residue of the confirmed quantity applicable to Leitensdorfer's claim, or to the claims of the other derivative claimants whose appeals are now pending before the commissioner. They therefore in fact preclude that officer from considering the appeals of complainant and of those derivative claimants. It is admitted in Craig's answer, (transc., 66,) that under the authority of an opinion of attorney general Devens, "Secretary Schurz decided he could not arrest proceedings under said order of the President." The answer also admits that the commissioner considered himself stripped, by that order, of all

" discretion over the action of the said register and receiver," and admits further that many " ineffectual efforts have been made by complainant's counsel to obtain relief " for Leitensdorfer. (*Id.*) And it is a familiar, general doctrine, that after the executive issues a land patent, its power ends, and relief against the patent must be sought in court. (Bagnell *v.* Broderick, 13 Peters, 436, 450; U. S. *v.* Stone, 2 Wall., 525, 535; Johnson *v.* Townsley, 13 Wall., 72, 87; Warren *v.* Van Brunt, 19 *id.*, 646, 653, *per* Waite, C. J.) Here the whole executive department of the government, including the department of justice, practically holds that attorney general Pierrepont's opinion and the president's order enforcing it are law. (*E. g.*, 2 Decis. of Int. Dept., relating to public lands, 590.)

If the commissioner should entertain Leitensdorfer's appeals and decide in his favor, the decision, tho' affirmed by the Secretary, would be ineffectual, so long as Craig's plat and patent are outstanding, for they exhaust the fund which would be otherwise available in satisfaction of Leitensdorfer's claim. The wrong resulting to him from Craig's titles is clear. The right of Leitensdorfer is also clear. The proof shows his equitable title, and shows that he was in possession under it at least from 1862 to the 15 November, 1878, when the testimony was taken. (Transc., 433-4.) But his right is not merely equitable. His title is equitable; but his right to try it before the commissioner and secretary is a legal right, created by statute. (Act 4 July, 1836, S. 1, 5 stat., 107; R. S., §§ 453, 441; Magwire *v.* Tyler, 1 Black, 195, 202; Maguire *v.* Tyler, 8 Wall., 650, 667; and especially, Snyder *v.* Sickles, 98 U. S., 203, 210–211.)

We have thus shown the wrong which Craig's plat and patent work to Leitensdorfer and the rights of which they deprive him, and will enlarge on the same views under more appropriate heads, in subsequent parts of this brief. It only remains to consider now—is there a remedy, and does the supplemental bill ask the right remedy? The irregularity, illegality and fraud marking the inception and development of Craig's title and his improper and unprecedented proceedings in getting that title, present such a case that equity would be swift to cancel the title as a cloud on complainant's title and rights, unless the law is clear against that remedy.

On the authority of Johnson *v.* Towsley, (13 Wall., 72, 87,) as approved in Warren *v.* Van Brunt, (19 *id.*, 646, 653,) the court below dissolved the injunction granted on Leitensdorfer's first bill, and did so upon the hypothesis that equity could not interfere with the operations of the executive department till they had been exhausted, and on the further hypothesis, apparently, that complainant, after the granting of the title to Craig could, by some ordinary proceeding, hold Craig as his trustee, and so

compel a delivery to complainant of Craig's title. Now complainant, in his bill for an injunction, did not seek to interfere with the lawful operations of the executive department. His bill was conservative of those operations, not destructive of them. He did not pray the court to establish or enforce his title, but simply sought to enable the commissioner and secretary to investigate it according to law. There had truly been an interference with the lawful operations of the executive department; but Mr. Pierrepont and the president were the authors of the interference, and the injunction sought to remove the interference and to reinstate the appellate jurisdiction of the commissioner and of the secretary which the president, by a peremptory executive mandamus, issued without affidavit or rule to show cause, and without authority of reason, law or precedent, had deliberately deposed.

Nor could Craig, in any case, be held as Leitensdorfer's trustee. Their claims are many miles asunder. Neither party pretends title to any land within the derivative claim of the other party. Hence Craig could not sue to eject Leitensdorfer, nor could Leitensdorfer sue to eject Craig. Where A and B claim the same land, and A has the better equity, notwithstanding which the federal patent issues to B, the chancellor, in a proper proceeding, will sustain A's equitable title against B, and hold B as A's trustee, (see Johnson *v.* Towsley, 13 Wall., 72, 87,) and make B convey the legal title to A. (Finley *v.* Williams, 9 Cr., 164, 167, by Marshall, C. J.; McArthur *v.* Browder, 4 Wheat., 488, 491, by Marshall, C. J.; Rector *v.* Gibbon, 111 U. S., 276, 291.) But such is not Leitensdorfer's case. He pretends no right to any of Craig's claim. Besides, the rule just stated only applies to cases where the legal title lawfully issues from the U. S. and is simply delivered to the wrong man. Here, however, Craig's plat and patent are void, having been issued without authority, and against law. The government could not lawfully grant them to any one. The act of 25 Feb'y, 1869, s. 3, provides that titles shall be furnished "upon the adjustment of the Vigil and Saint Vrain claims according to the provisions of this act;" (15 stat., 275;) but if Leitensdorfer is entitled to his appeal to the commissioner, as we will show, under point VI, that he is, there can be no adjustment till that appeal be tried; and hence Craig's titles issued without authority, and against law. While the commissioner, in subordination to the secretary, was proceeding with the adjustment of the Vigil and Saint Vrain derivative claims according to the provisions of the act of 25 Feb., 1869, the presidential order issued, and it suspended and suspends that adjustment. (See secretary's decision, 23 Jan'y, 1875, transc., 401.)

It is also plain that no court could, on Leitensdorfer's application, sustain Craig's titles, and hold Craig to be his trustee for

one sixth of the lands described in them. This might be done if Leitensdorfer's title were an undivided or floating one. But it is not such. He claimed before the register and receiver the land on which he was *actually settled*, and could then claim no other land under the act of 1869; nor can he claim any other now, for the terms of the act forbid it, and the lapse of a year has, under the act, barred such additional claim. His title, like those of all the derivatives, is inchoate till lawfully adjusted by the commissioner and secretary, and he must accept it, not as he would like, nor as the text books of law or equity would treat it, but "on such conditions as Congress saw proper to prescribe" (Menard *v.* Massey, 8 How., 293, 310) by the specific acts of 21 June, 1860, and 25 Feb., 1869, and by the general provisions of the act 4 July, 1836, s. 1, and of the R. S., § 453, 441.)

For the above reasons, the undersigned counsel never countenanced the theory of holding Craig as Leitensdorfer's trustee, and that prayer in the bill was dismissed on Leitensdorfer's motion. (Transc., 113.)

It thus appears that complainant's case is not one "where a plain, adequate, and complete remedy may be had at law," (R. S., § 723,) and that, indeed, he had no remedy save that prayed in the supplemental bill. That equity will interfere by a proper proceeding, now that the executive power has exhausted itself, is clear. (Commissioner *v.* Whitely, 4 Wall., 522; Gaines *v.* Thompson, 7 *id.*, 347; Litchfield *v.* Register and Receiver, 9 *id.*, 575; Samson *v.* Smiley, 13 *id.*, 91; Warren *v.* Van Brunt, 19 *id.*, 646; and especially, Johnson *v.* Towsley, 13 *id.*, 72, 84, by Miller, Jr.)

"In the recent case of Shepley, *et al. v.* Cowan, *et al.*, (91 U. S., 340,) the doctrine is thus aptly stated by Mr. Justice Field: 'The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions;'" &c. (Moore *v.* Robbins, 96 U. S., 530, 535, by Miller, J.)

"Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery." (Jones *v.* Bolles, 9 Wall., 364, 369, by Bradley, J.)

Having now shown that the supplemental bill presents a proper case for the interference of equity, and that the court below had power to interfere, and that no remedy is attainable save cancellation, it, but remains to inquire if that specific remedy applies here. It is admitted that this case has no precedent. The act of 25 February, 1869, is anomalous in its details, and the peremp-

tory mandamus of the president is without a model. Never before did the president, on the *ex parte* application of an interested party, deliberately ignore the deliberate decision of the head of a department in a matter of private right. If therefore, the books show no case like this, it is because Craig has so involved his title as to outrun analogy and bid defiance to precedent. But the general principles of equity are more than a match for the subtlety of man, and those principles sanction the remedy of cancellation as sought here by the supplemental bill. (Story Eq., § 852, *et seq.*)

When the bill prays for no discovery, but avers the instrument to be void, as the non-delivery or non-cancellation is, from its nature, calculated to throw some doubt on the title, or is "capable of misuse," equity, it has been held, would seem to require an interposition to prevent serious mischief. (2 Story Eq., § 699.) But whatever may have been the former doubts, "the jurisdiction is now maintained to the fullest extent," (*id.*, § 700,) and embraces cases where the instrument, having been executed, is void on grounds of law and equity. (*Id.*, § 701; Willard's Eq., 304, 307, ed. of 1863; and see Blodget *v.* Blodget, 42 How., N. Y., Pr., 19; 1 Story Eq., § 328, 333.) After a patent issues to A, equity may examine whether the land office has been imposed on by fraud, false swearing, mistake, or otherwise, and grant appropriate relief. (Johnson *v.* Towsley, 13 Wall., 72, 84.)

An equitable title in plaintiff suffices to maintain a suit to remove a cloud from that title. (Doe *v.* Doe, 37 N. H., 268; and see Sossaman *v.* Powell, 21 Texas, 664.) And no statute is necessary to give a court of equity the jurisdiction; (Low *v.* Staples, 2 Nevada, 209;) for it "is inherent in a court of equity." (Holland *v.* Challen, 110 U. S., 15, 24.) "Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties." (*Id.*, quoting from Broderick Will Case, 21 Wall., 503, 520.) The statute enabling a party in possession to sue for removing any cloud from his title, includes every kind of claim—legal, equitable, or of what nature soever—whereby plaintiff may lose the property or be incommoded or damnified by the assertion of an outstanding title, present or prospective, or whereby the value of the property may be decreased or its title clouded. (Head *v.* Fordyce, 17 Cal., 149; and see Douglass *v.* Nuzum, 16 Kansas, 515.) One in quiet, peaceable, and rightful possession, claiming title, has such an interest, though his title be never so defective, that he may maintain an action to quiet his title and possession against any adverse claimant whose title is weaker than his, or who has no title. (Giltenan *v.* Lemert, 13 Kansas, 476.) And in an action to quiet title, by a plaintiff in actual possession, defendant cannot defeat it by showing a paramount right in another, even in a co-defend-

ant. (Brenner *v.* Bigelow, 8 Kansas, 496.) To constitute the cloud, there need not be a title on record, apparently valid. It is enough if there be a deed valid on its face, accompanied by claim of title, under such circumstances that equity can see that the deed is likely to work mischief to the real owner. (Fonda *v.* Sage, 48 N. Y., 173.) A bill *quia timet* lies for merely uttered words slandering complainant's title. (Hendricks *v.* Montague, L. R., 17, Chancery Division, 638.) The equitable jurisdiction is intended to reach those out of possession, who cannot be compelled to defend themselves at law. (Barron *v.* Robbins, 22 Mich., 42.) And see King *v.* Higgins, 3 Oregon, 406, defining the cases in which this jurisdiction may be exercised.

The right of an equitable owner to file a bill to cancel, as a cloud on his title, a patent illegally issued by the U. S., is sustained by the opinions of attorneys general Wirt, (1 Opinions, 300, 458,) Legare, (4 *id.*, 121,) and Clifford, (4 *id.*, 560.) Mr. Legare relied on Seward *v.* Hicks, 1 Har. and McH., 24; Lord Proprietor *v.* Jennings, *id.*, 92; and Bagnell *v.* Broderick, 13 Peters, 436, 450. In Carroll *v.* Safford, which came here on a certificate of division from the U. S. circuit court for the district of Michigan, the court said:

"In regard to the fourth point certified, we entertain no doubt, that, in a proper case, relief may be given in a court of equity. This may be done on the ground to prevent a cloud from being cast on the complainant's title, or to remove such cloud; to prevent multiplicity of suits, or to prevent an injurious act by a public officer, for which the law might give no adequate redress." (3 Howard, 441, 463; and see Hilliard on Injunctions, sec. 18.)

In Cunningham *v.* Ashley, (14 Howard,) the plaintiff's pre-emption entry was rejected by the register and receiver. The commissioner affirmed the rejection and, on appeal to the secretary of the Treasury, he affirmed the decision of the commissioner. The U. S. then patented the land to defendants' vendors. The plaintiff, still in possession, then filed his bill against the claimants under the patents. The supreme court of Arkansas decreed against the complainant, who brought the case to this court by writ of error. The court *declared the patents void*, and required the respondents to execute a quit-claim to the complainant for the part of the land claimed by him. (*Id.*, 378, 389.) And in Barnard *v.* Ashley, (18 Howard,) Barnard, claiming four quarter sections under several pre-emption rights rejected by the register and receiver, filed a bill in the U. S. circuit court to cancel the U. S. patents which had issued on conflicting locations. Ashley insisted that, as the register and receiver, under the act of 29 May, 1830, (4 stat., 420, sec. 3,) had rejected Barnard's claim while acting in a judicial capacity, their judgment was final.

Ashley, claiming, under a senior patent, one of the quarters patented to Barnard by the commissioner, reversing the register and receiver, filed a cross bill, praying to be quieted in his title to that quarter because the *junior patent had improperly issued to Barnard.* There was a decree for Ashley. Barnard appealed to this court, which, by Catron, J., affirmed the decree, saying the commissioner could, under the act of 4 July, 1836, s. 1, (5 stats., 107,) review the action of the register and receiver as to their additional proceedings after that act.

So, in Field *v.* Seabury, which came here from the U. S. circuit court for the district of California, this court said that in England and in the United States, "a bill in equity lies to set aside letters patent obtained from the King by fraud." (19 How., 323, 332.)

It is true that in Orton *v.* Smith, (18 Howard, 263, 265,) the court said: "Those only who have a clear, legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." But that was a *dictum.* The bill there was filed by "the assignee of a secret equity for apparently a mere nominal consideration, and of the bare legal title for a like consideration. This legal title was improperly assigned to him, during the pendency of a suit in chancery to ascertain the person justly entitled to it." (*Id.*, 265.) The court meant that the holder of such a title could not invoke relief from equity. If Leitensdorfer has not a legal title, it is because the misconduct of Craig has made it impossible to get one till Craig's titles be out of the way. Therefore, to say that Leitensdorfer cannot file his bill till he has a patent, would enable Craig to take advantage of his own wrong. Orton *v.* Smith was decided in 1855, when a bad habit prevailed in the general land office "of issuing patents to different parties for the same land." (Johnson *v.* Towsley, 13 Wall., 72, 85.) But now the rule is different, so that it would not work equity, at this day, to say that none but the holder of the legal title can file a bill to remove a cloud from his title caused by a hostile federal land patent. Such was the view taken by this court in the able decision just referred to. There the court, speaking of a certificate of purchase issued by the register and receiver, said:—"Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy." (Johnson *v.* Towsley, 13 Wall., 72, 85, by Miller, J.) The context shows that the court meant the judicial authority of a court of equity.

So, in Steele *v.* Smelting Co., the court, by Justice Field said:—to vacate a U. S. land patent "the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way." (106 U. S., 447, 454.)

In Chapman *v.* Brewer, (114 U. S.,) which was a bill in the U. S. circuit court for the western district of Michigan to remove a cloud from Brewer's title, the words of this court apply to Leitensdorfer's supplemental bill:—"The claim of the defendants, under the levies, is one which ought not to be enforced. It has no validity as against the rights of the plaintiff; it throws a cloud on his title; he is in possession, and cannot sue at law; and the papers supporting the defendant's claim are not void on their face." (*Id.*, 158, 171, by Blatchford, J.; and see cases there cited.) And in Polk's lessee *v.* Wendell, (9 Cr., 87, 99,) which was ejectment, involving conflicting patents, Chief Justice Marshall said: * * * "the great principles of justice and law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired, might be examined. In general, a court of equity appears to be a tribunal better adapted to this object than a court of law."

There seems to be no doubt that, as stated in our proposition II, *the court below had power to grant the relief sought, and thereby remove the cloud from Leitensdorfer's title.* The only doubt suggested in the late decisions, is, whether the government should not have brought this suit. On this point we hold that,—

III. LEITENSDORFER HAD A RIGHT TO SUE INDEPENDENTLY OF THE DEPARTMENT OF JUSTICE.

Craig demurred below to the supplemental bill, on the ground that it does not state such a case as entitles Leitensdorfer, in equity, to any relief against Craig, and on the ground that the court below had "no jurisdiction of the parties to the suit, or of the subject matter of litigation mentioned in the bill." (Transc., 54.) After the demurrer was overruled, he answered. (*Id.*, 58.) But no objection was made below, that the U. S. should have brought this bill, or that the attorney general should have authorized it; and it is too late to raise the objection here. Leitensdorfer's first bill was filed below on the 4 May, 1877, (Transc., 1,) nearly ten years ago. To allow Craig now to object that the U. S. should have sued, might cause another delay of ten years. It concerns the commonwealth that there be a limit to litigation; but if such nominal objections are suffered to be raised for the first time in this court, law suits would outlive the suitors, and titles to lands might remain unsettled indefinitely. For these

and like reasons, such dilatory pleas must be made in *limine litis*. For example, an objection to the misjoinder of the assignor of a patent with his assignee for a particular locality, in their suit to restrain the use of the machine patented, is too late if first taken here. (Livingston *v.* Woodworth, 15 How., 546.) So, a plea in bar admits the ability of the plaintiff to sue. (Yeaton *v.* Lynan, 5 Pet., 223.) Where the plaintiffs are a corporation, want of corporate capacity must be insisted on, in the circuit court, by a special plea in abatement, or in bar. (The Society for the Propagation of the Gospel *v.* The Town of Pawlet, 4 Pet., 480, 501.) And see Conard *v.* Atlantic Ins. Co., 1 Pet., 386, 450.

But if this court should proceed to consider the objection to the capacity of Leitensdorfer to sue, it is submitted that his capacity must be sustained. As a rule, land patents issue without the knowledge of the attorney general or the president, though always in the president's name. In such cases, the executive power, through the attorney general, might consistently interfere to get a judicial cancellation of the patent, on grounds discovered after its date. But here, Craig's plat was issued upon great deliberation, in pursuance of the written opinion of the attorney general and the peremptory written order of the president, after the department of justice and the department of the interior had refused to interfere with the opinion and order. When secretary Schurz asked attorney general Devens whether the action of the preceding administration relating to Craig's case could be reviewed by the Hayes' administration, the attorney general said no, and announced the rule, "that the official acts of a previous administration are to be considered by its successor as final, so far as the Executive is concerned." (15 Opinions, 208.) Thereupon secretary Schurz, as Craig's answer admits, "decided he could not arrest proceedings under said order of the President." (Transc., 66.) Secretary Teller says,—"the Attorney-General determined that the finding of the register and receiver was final, and by order of the President this was held to be the law of the Department." (2 Decis. of Dept. of Int. relating to Pub. Lands, 590, 593.)

Now, neither law or equity required Leitensdorfer to do a thing so vain, as to ask the department of justice to interfere by suit to undo what the whole power of the president, of the department of justice and of the interior department had united in consummating, upholding and defending. The effort would have been futile. Leitensdorfer asked a stay of proceedings and an investigation by the Hayes administration. (Transc., 66,) As those mild remedies were refused, is it likely that such heroic treatment as a bill to cancel would have been adopted by the executive? Besides, it was not necessary for Leitensdorfer to suggest a suit by the U. S. The government can sue on its own motion,

at any time, if it will. The heads of departments do not usually wait for a citizen to teach them their duties. Leitensdorfer tried to inform them of the law of this case, and they would not hear him. When the interior department grants a patent for an invention, or for land, the attorney general will not cause a bill to be filed to cancel the patent, unless the secretary of the interior reports the case to him and suggests the suit. The authorities contemplate the primary action of the head of a department, in order to authorize the attorney general to cause a suit to be instituted in the name of the U. S. to revoke a thing done by that head. Such, too, is the usage. The Department of justice cannot undo the final, deliberate action of the interior department, or seek to undo it, save on the suggestion of the latter department; (6 Opinions, 349; 7 *id.*, 577; 8 *id.*, 465;) otherwise unseemly conflicts might arise between those departments. It follows that the attorney general would never interfere in this case unless requested to do so by the secretary of the interior; and we have seen that that department holds itself bound in this case by the action of the president who is the head of all the departments, and will not so much as investigate the case.

Moreover, Leitensdorfer had capacity to sue. (1 Opinions, 300, 458, by Wirt; 4 *id.*, 121, by Legare; 4 *id.*, 560, by Clifford; 1 Har. and McH., 24; 13 Pet., 436, 450: and see Shepley *v.* Cowan, 91 U. S., 330, 340, quoted and approved in Moore *v.* Robbins, 96 U. S., 530, 535, by Miller, J.) Lytle *v.* Arkansas, (9 How., 314,) was a bill in an Arkansas circuit court by claimants under a pre-emption entry not patented, against claimants under a U. S. patent alleged to have been issued in mistake and against law, and in fraud of the pre-emptor's right, praying for the surrender of the patents to complainants. The bill was dismissed on special demurrers, and the cause was then taken by writ of error to the supreme court of Arkansas, which affirmed the decree. The case was then brought here by writ of error. The decree of the state supreme court was reversed through McLean, J., and the case remanded for further proceedings; but not a word was said against Lytle's capacity to sue. (9 How., 314, 329.) The case came here again in Lytle *v.* Arkansas, 22 *id.*, 193, and was elaborately argued; but the court did not object to Lytle's right to bring his bill. So, in Cunningham *v.* Ashley, (14 *id.*, 377, 389,) this court, by McLean, J., declared certain U. S. patents void, on a bill filed by the pre-emptor, Cunningham, without objecting to his capacity. There, "Various efforts were made by the complainant, at the Land Office at Batesville, and at the General Land-Office, at Washington, to procure a full recognition of his pre-emption claim. Appeals on the subject were made to the Secretary of the Treasury, and to the Attorney-General, all of which resulted in the denial of his claim," &c. (*Id.*, 379.)

So in Barnard *v.* Ashley, (18 *id.*, 43, 45,) where Barnard, claiming under certain pre-emption rights, had filed his bill in the U. S. circuit court to cancel the U. S. patents issued on conflicting locations, there was a decree for Ashley, which this court, on appeal by Barnard, affirmed through Catron, J., but the court, in giving its reasons for the decree against Barnard, said nothing against his capacity to sue. So, in Newhall *v.* Sanger, (92 U. S., 761,) Sanger, claiming under a U. S. railroad grant, and a patent, filed his bill in the U. S. circuit court for California to cancel the junior conflicting U. S. patent under which Newhall held, and there was a decree accordingly. Newhall then appealed to this court, and the court, by Davis, J., reversed the decree and remanded the cause with directions to dismiss Sanger's bill. Justices Field and Strong, dissenting, thought that the decree below for Sanger should be affirmed. Sanger's capacity to sue was not questioned by the court, and the dissenting judges tacitly assumed that he had the capacity. Vance *v.* Burbank, (101 U. S., 514, 518,) was a bill in the U. S. circuit court for the Oregon district, on behalf of a settler under the Oregon donation act of 27 September, 1850, (9 stat., 496,) to have a conflicting U. S. patent declared invalid, and for a conveyance of the conflicting title to complainants. The bill was dismissed on demurrer. Vance brought his appeal here. This court, by chief justice Waite, affirmed the decree below, saying nothing against Vance's capacity to sue.

In all of the above cases, this court seems to have assumed, without discussion, the right of a man, damnified by a U. S. land patent issued to another person, to file a bill with a view to getting the patent out of the way. But there are other cases in which the court has deliberately doubted, denied, or affirmed the man's capacity to sue in such cases. U. S. *v.* Hughes (11 How., 552, 568) was, strange to say, an *information*, filed in the U. S. circuit court, on behalf of the U. S., in the name of the district attorney, to cancel a U. S. land patent for fraud, because the land had been first entered by a preëmptor whose entry was unpatented, and whose title and occupancy were known to Hughes at the dates of his own entry and patent. Hughes demurred. The demurrer was sustained and the bill dismissed. The U. S. then appealed to this court, which, by justice Catron, reversed the decree and canceled the patent for fraud, saying the U. S. *may* sue in such a case; not that it must sue. But the case came here again in Hughes *v.* U. S. (4 Wall., 232, 236), and the court said, through justice Field, that "it was the plain duty of the United States to seek to vacate" the patent to Hughes. But this was said in furtherance of equity; for, said the court, "Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence." (*Id.*, 236.) The right of the

injured preëmptor, in these cases, to have filed a bill against Hughes, was not denied in either case; and clearly that was the better remedy, as may be inferred from the words of justice Field, speaking for the court, in Steele *v.* Smelting Co. (106 U. S., 447), reviewed below.

Field *v.* Seabury (19 How., 323, 332,) declared that a bill lies in the United States, generally, to set aside a land patent got by fraud; "but," said the court through justice Wayne, "it is a question exclusively between the sovereignty making the grant and the grantee." That, however, was a *dictum*, the point there being whether, in ejectment, the defendant can raise the question of fraud between the grantor and grantee. (*Id.*, 332.) The court, in that case, properly held that the defendant could not raise the question. But U. S. *v.* Throckmorton (98 U. S., 61, 70, 71) is a little more to the point. That was a brave, omnivorous bill in the U. S. circuit court for California, "by Walter Van Dyke, United States attorney for that district, on behalf of the United States," to avoid, for fraud, a confirmation of a land claim by the board of commissioners, and the decree of the U. S. district court affirming their decree. The bill was dismissed on demurrer. The U. S. appealed. This court, through justice Miller, affirmed the decree of the circuit court, because it did not appear that the attorney general had brought the suit, or had given such orders for filing it as would make him officially responsible and show his control of it. Said the court, "unless by virtue of an act of Congress, no one but the Attorney-General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts on which such a patent is founded." (*Id.*, 71, 70.) In that case, however, the merits of the bill, as discussed by justice Miller, show that it would have been a glaring perversion of equity to have countenanced the bill. The court justly meant, by the words quoted, that the U. S. cannot bring a bill to cancel its own land patent, without the sanction of the attorney general as the head of the department of justice; and the court might have said that the department of justice should not act at all in such cases, save on the report and suggestion of the secretary of the interior. (6 Opinions, 349; 7 *id.*, 577; 8 *id.*, 465.) That justice Miller did not mean to deny the right of any man, in a proper case, to impeach the government patent, may be surmised from his words in U. S. *v.* Minor (114 U. S., 233), cited below.

Stone *v.* U. S., erroneously reported as U. S. *v.* Stone, (2 Wall., 525, 536,) was a bill by the U. S. in the federal court of Kansas, to cancel a U. S. patent on the ground of error in issuing it for land reserved for a military reservation. The court decreed accordingly. Stone brought his appeal to this court which affirmed

the decree. The court does not discuss the question whether the government *must* sue in bills to cancel its own land patents; though it is clear that in Stone's case the government alone could sue. All cases, perhaps, may be solved by some appropriate maxim of the sages of the law; and the case of Stone, and indeed all the cases upon the point of law now under discussion, hinge on the rule of old Jenkins, *actio non datur non damnificato.* (Jenk. Cent., 69.) An action is not given to one who is not injured. In the case of Stone, the land in controversy was the property of the U. S., and hence the government alone could sue. So, in Silver *v.* Ladd, (17 Wall., 219, 228,) where Silver sued to cancel Ladd's land patent, this court, through justice Miller, remanded the case for a conveyance of Ladd's title to Silver, saying that to cancel Ladd's patent would leave the title in the U. S., and it might well be doubted if the patent could be set aside unless the U. S. were a party. But in U. S. *v.* Minor, (114 U. S., 233, 243,) justice Miller, pronouncing the opinion of the court, deprecated federal interference in other cases where the government has no interest in the land. There, the U. S. brought a bill, in the U. S. circuit court for California, to cancel a land patent for fraud. The bill was dismissed on demurrer. On appeal by the government the decree was reversed. "We have steadily held," said the court, "that, though in the absence of fraud the facts were concluded by the action of the Land Department, *a misconstruction of law, by which alone the successful party obtained a patent, might be corrected in equity, much more when there was fraud and imposition.*" (*Id.*, 243-'4.) The court added:—"And it may become a grave question in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant. The question, however, does not arise here, for half the land covered by the patent would revert to the United States if it was vacated." (*Id.*, 244.)

So, in Moore *v.* Robbins, (96 U. S., 530,) this court, also through justice Miller, said that after the U. S. issued its patent, if fraud, mistake, error or wrong had been done, the government should sue to cancel, if the party injured; but that if an individual claimant of the land has been injured, he may sue. (*Id.*, 533.) And it is submitted, with respect to such a suit by a citizen, that, in the words of Carroll *v.* Safford, (3 How., 441, 463,) "This may be done on the ground to prevent a cloud from being cast on the complainant's title, or to remove such cloud;" &c.

The old saw, *actio non datur non damnificato*, is also illustrated in Steele *v.* Smelting Co., (106 U. S., 447,) which was ejectment, in the U. S. circuit court for Colorado, by the company, claiming

under a U. S. mineral land patent, against Steele and others, claimants in possession under a town site entry of the public lands of the U. S. Steele answered that the company's patent was void for fraud, &c. The company demurred to these defenses. The circuit court sustained the demurrer and entered judgment for the company. Then Steele, by writ of error, brought the case here, where justice Field, speaking for the full bench, affirmed the judgment below. Said the court, — to vacate a U. S. land patent "the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation." (*Id.*, 454.) But the proper officer to decide, in such cases, whether the government should sue, is the secretary of the interior, (see Western Pacific R. R. co. *v.* U. S., 108 U. S., 510, 511,) who has declined to advise such suits where "the government has no interest in the land." (Mary Yaney's case, 12 Copp's Land Owner, 295; s. c., 4 Decis. of Dept. of Interior relating to Pub. Lands, 366.) In that case, which was a conflict between Yancy's pre-emption entry and certain junior hostile patents, secretary Lamar, citing the decisions of this court, said,—

"There does not seem to be any reason why Mrs. Yancy may not assert any legal or equitable right she may have in the land in the courts of the country in her name." And see Jeremiah Hall's case, 13 Copp's Land Owner, 11; s. c., 4 Decis., &c., 373.

The above review of the cases on this point III of our brief justifies these conclusions:—1st. Where a man's right to land, under the land laws, is injured by a hostile U. S. patent, he may bring his bill to cancel it. 2nd. The books show no case where this court, under such circumstances, has dismissed such a bill on the ground that the U. S. should have sued or authorized the suit. 3d. There are cases where this court, under such circumstances, has sustained an injured settler's bill, and declared the hostile patents void. (E. g., Cunningham *v.* Ashley, 14 How., 377, 379, 389.) 4th. Where the rights of the government alone are injured, the government alone can bring the bill.

Now, in the present case, what interest has the government? If this court annuls Craig's titles, it seems that his 73,251.55 acres, in place, will remain the property of the government. But, whilst congress only confirmed the claim of Vigil and Saint Vrain for 22 square leagues, equal to 97,650.96 acres, the derivative claims presented to the register and receiver aggregate 39 claims and 183,553 85 acres. (Transc., 184, 186.) Of these claims,

the register and receiver rejected twenty containing more than 85,939.32 acres, (*id.*, 185–6,) and the appeals of nineteen of the rejected claimants are now pending before the commissioner. (*Id.*, 331.) So that, if this court decrees against Craig, the quantity of acres, though not the land itself, embraced in his claim, would simply have to be distributed among the most meritorious of the appealing derivatives. In other words, congress has confirmed this grant for 97,650.96 acres; this action by the legislature binds the executive and judiciary; the whole of that quantity must be parcelled out by the executive to the derivatives, and hence so much of this peculiar fund as might be saved to the government by canceling Craig's titles, would necessarily be distributed to other and more worthy derivatives of whom Leitensdorfer is one, for they have appealed to the commissioner from the rejection of their claims by Stanton and Cook.

It follows that the government has no interest. But if it has an interest, it is one contingent on the result of this bill, and not an immediate interest like that of Leitensdorfer or of those claiming under him. Besides, we have seen that the whole executive department of the government, including the department of justice, declines to consider any interest but Craig's. Therefore, if the decisions contemplated in such a peculiar case as this, that the government should sue, the fact that the executive will not even look at Leitensdorfer's claim, would surely justify his bill. The interests of himself and vendees are tangible, absolute, of great pecuniary value, and must, with all of his equities, be utterly destroyed if Craig's titles be not annulled. The history of suits to cancel land patents, when conducted by district attorneys, affords but little assurance that this suit, involved, difficult, expensive, and protracted as it has proved, would have been so zealously and thoroughly pursued by the department of justice, as it has been pursued by Leitensdorfer and Allen. (Western Pacific R. R. Co., *v.* U. S., 108 U. S., 510, 512.) A man's own private interests are best attended to by himself. The interest of the government, however plain it might be, would not, if neglected, preclude Leitensdorfer from asserting his own unquestionable individual interest. The neglect of the government would rather seem to necessitate a bill by Leitensdorfer as the sole remaining remedy for his wrong. The fact that his interest is derived from law, will appear under the next head.

IV. LEITENSDORFER, BEING A DERIVATIVE CLAIMANT UNDER THE ACT OF 25 FEBRUARY, 1869, (15 STAT., 275,) HAD SUFFICIENT INTEREST TO MAINTAIN THIS SUIT.

Eugene Leitensdorfer obtained his sixth interest by a donation deed from the Mexican grantees, on the 7th of March, 1844.

(Transc., 287.) On the 24 February, 1860, Spence M. Baird executed to Eugene Leitensdorfer a power to sell any interest that Baird might have in any lands in the territory of New Mexico. (*Id.*, 295.) On the 10 December, 1861, and again on the 22 May, 1872, Leitensdorfer, for himself and as the agent of Baird whose precise interest does not appear, conveyed, for value, all of their interest in this grant to Thomas Leitensdorfer, (*id.*, 292, 294,) who, on the 23 October, 1872, filed his derivative claim in the U. S. land office at Pueblo, Colorado. (*Id.*, 284, 285.) This proceeding was in the nature of a suit or petition for the confirmation of his claim, and all subsequent sales by Leitensdorfer of parts of his claim are sales *pendente lite*, and his vendees, though they will be bound by the decisions which may be made by this court, or by the commissioner and secretary ultimately, just as though the vendees were parties to the record, (Tilton *v.* Cofield, 93, U. S., 163, 168; Whiteside *v.* Haselton, 110 U. S., 296, 301; Swann *v.* Clark, *id.*, 602, 607;) cannot be substituted for Thomas Leitensdorfer, but can only be heard in the argument, in order to sustain their supposed interests. (Order of this court of 7 January, 1884, and decisions of the commissioner and secretary of 27 June, 1883, and 15 September, 1884;—all relating to Mrs. King's motion to intervene here: see 2 decis. of Dept of Interior relating to Pub. Lands, 378, 380; 3 *id.*, 110, 111.) The same principles apply to all persons who have bought any part of Craig's claim since he filed it before the register and receiver. We do not find precisely when it was filed; but the bulk of his evidence in support of his claim was filed on the 12 February, 1872, (Transc., 201, 203, 206, 207, 209, 211, &c.,) and it follows that his claim was filed on or before that day. We will show under proposition VII that the president's decision of the claim was void, and that the claim is therefore yet pending before the commissioner.

On the 1 July, 1873, Thomas Leitensdorfer, *after filing his claim*, conveyed his whole interest in it to John Hallum. The deed is not in the record, but it is proved by Hallum's testimony, who declares (Transc., 84,) that half the land was conveyed to him for his own use, and to secure counsel to prosecute the claim. "The other half," said Hallum, "was to me in trust for himself, *and he yet owns one-half of the said Leitensdorfer interest.*" (*Id.*) About the 1 August, 1873, Hallum left with Charles A. Cook, the receiver at Pueblo, on Cook's suggestion, a deed conveying to Joseph S. Adams, for $25,000, cash, half the interest of Hallum and half of the interest of Leitensdorfer in the latter's derivative claim. The deed was to be delivered to Adams by Cook, on payment of the price, and Adams was to return the deed to Hallum if the price was not paid. Adams was also to receive the price and pay it over to Leitensdorfer and Hallum, half to each. In October, 1873, Hallum came to the territory again, when Cook told him that

Adams had declined to take the property. Hallum then demanded the return of the deed, and Cook promised to get and return it, but never did so. No consideration was paid for the deed. The deed was recorded in November or December, 1873, having been sent for record in a letter signed "Joseph S. Adams," at Pueblo. Cook had represented that Adams was a wealthy citizen of Arapahoe County, Colorado, but Hallum subsequently found out that no such man ever lived there. Afterwards, in the latter part of 1874, in the district court of the territory for Las Animas county, Hallum filed a bill against this Joseph S Adams, before Judge Hallett, the district judge; but the judge dismissed the bill on the ground, as Hallum understood, that no title could vest in a nonentity, and no relief was grantable against one. Hallum, satisfied that the judge was right, took no appeal. (Transc., 85, 89.)

Craig's answer, (trans., 69,) avers that this affair was an offer, by Thomas Leitensdorfer, to bribe Stanton and Cook to make a decision in his favor, which offer they "rejected with indignation;" *but no proof of the averment was tendered by Craig.* The only evidence which the transcript contains on the point, is the examination and cross-examination of Hallum, who offered himself as a witness for Leitensdorfer. Hallum also says that he afterwards conveyed to A. J. Heath the same interest expressed in the deed to Adams, and put the deed to Heath on record as legal notice to the world that Adams had no title. (Transc., 85.) The day after the conveyance to Heath, who paid nothing for the interest, (*id.*, 90,) Heath reconveyed to Hallum by a deed which was not recorded. (*Id.*, 85.)

We think this transaction does not make out the charge of attempted bribery against Thomas Leitensdorfer; for 1st. Craig would have called Stanton to prove the attempt, had it occurred. 2nd. The actual, indirect bribery of Stanton and Cook, by Craig, which will be hereafter eviscerated, makes it likely that, if a bribe had been offered to those officers by Thomas Leitensdorfer, they would have accepted it. 3d. Those officers were reported by the commissioner to the secretary for removal, on the ground of fraudulent or improper practices in connection with the derivative claims in the Vigil and Saint Vrain grant. (Transcript, 187 and especially 189.) The first of these reports was made on the 27 January, 1874. The decisions of Stanton and Cook on the claims of Leitensdorfer and Craig were dated the 23 February, 1874, when their offices and integrity were in jeopardy. If a bribe had been offered by Leitensdorfer about the 1 August, 1873, and had been "rejected with indignation," why did not the officers state the fact in their labored report against Leitensdorfer's claim? Such a statement would have brightened their waning reputation and given the virtuous gentlemen what they eagerly sought and desperately needed,—a valid ground for rejecting Leitensdorfer's claim.

The truth, so far as it can now be found out, seems to be, that Hallum needed funds to pay the heavy expense of conducting Leitensdorfer's claim, and was beating about for a cash purchaser of a half interest. Knowing that an appeal would lie to the commissioner from all the decisions of Stanton and Cook, (Transc., 89,) it would have been folly for Hallum to bribe them.

Moreover, we are persuaded that a sense of gratitude to Mr. Hallum for his loving kindness in signing the stipulation for reversing the decree below against Craig, will induce the appellant to forbear from pressing this insinuation against Mr. Hallum's integrity.

Judge Hallett treated Hallum's deed to Adams as a nullity. But, were it otherwise, Adams was a buyer *pendente lite*, and should appear by counsel here and in the general land office, as Mrs. King has done. Whether he does so or not however, Leitensdorfer's decree, if affirmed here, will benefit Adams if he be not a bubble of the earth; for the settled rule is that an executive, legislative or judicial confirmation of a land claim in the original owner's name, enures to an intermediate vendee, who, as the equitable owner, can, by bill, compel the nominal confirmee or his heirs to convey to complainant the legal title. (U. S. *v.* Percheman, 7 Peters, 51, 97; U. S. *v.* Sutter, 21 Howard, 170, 182; Morehouse *v.* Phelps, 21 Howard, 294, 304–'5; and especially Landes *v.* Brant, 10 Howard, 348, 374.)

In considering the question, therefore, whether the complainant had enough interest to maintain this suit, the conveyances to Adams and Heath may be ignored.

On the 18 August, 1873, after the deed to Adams, Hallum conveyed to John F. Darby an undivided sixteenth of all of Thomas Leitensdorfer's claim and to John B. Lester a like interest. Lester, on the 1 September, 1873, conveyed his interest to Darby, who, on the 22d June, 1874, conveyed all to Josephine Farnsworth. These three deeds, all absolute, are not in the transcript, but are referred to in Hallum's testimony.. (Transc., 85.) Meantime, on the 5 May, 1874, Hallum conveyed to Josephine Farnsworth, complainant's sister, the undivided half interest which he had held in trust for complainant. (Transc., 172.) This conveyance, though absolute in terms, was in trust for complainant, who feared to hold the land in his own name. (*Id.*, 84.) The grounds of his apprehension are explained by affidavits filed in the general land office as a basis for relief. (See copies of them, Transc., 340-345.)

From this recital it seems that after Darby's conveyance to Josephine Farnsworth, she held two sixteenths of this claim absolutely and seven sixteenths in trust for complainant, and that John Hallum held seven sixteenths absolutely, to enable him to provide counsel and conduct this case. These were all undivided shares.

John Hallum, on the 16 April, 1877, for $1000 cash, advanced by Josephine Farnsworth, "to aid in prosecuting the Las Animas land grant claim," executed to her an absolute quit-claim deed for section 24, the east half of section 28 and the east half of section 32, T. 32 S., R. 63 W., and an undivided ½ of a town lot in Trinidad, all in Las Animas county, Colorado, and in Thomas Leitensdorfer's claim. This deed is not in the transcript, but appears on p. 77 of "Evidence in behalf of Appellant in support of motion for rule to show cause," filed in this court during October term, 1885. The deed was made before filing Leitensdorfer's first bill, and was recorded after the bill was filed. Of course it simply conveyed, in effect, to Mrs. Farnsworth, the undivided seven sixteenths' interest which Hallum then had in the described parcels, leaving the undivided seven sixteenths' interest of complainant untouched in the hands of his trustee, Mrs. Farnsworth.

All of the sales, thus far reviewed, were made *ante litem motam*. After the decree, the following sales occurred:

On the 12 November, 1880, John Hallum executed to Josephine Farnsworth an absolute quit-claim of an undivided twelfth of the grant to Vigil and Saint Vrain, (*excluding Thomas Leitensdorfer's derivative claim,*) being half of the sixth interest which Hallum asserted to the grant. This deed does not touch this case, but, if unexplained, might be assumed to do so. Of course it is not in the transcript.

On the 18 December, 1880, after Craig's first appeal was taken in this case, Thomas Leitensdorfer made an absolute quit-claim deed to Josephine Farnsworth, of all his interest in the Vigil and Saint Vrain grant, in consideration of money loaned and of the care and education of his children. The effect of this deed on Leitensdorfer's claim was to convey to his sister, in her own right, the seven sixteenths of that claim which she had before held in trust for him. The deed is not in the transcript.

Craig's first appeal was dismissed by this court on the 16 January, 1882. On the 10 April, 1882, for $20,000 cash, Josephine Farnsworth executed to Thomas J. Allen a warranty deed for all the land in Thomas Leitensdorfer's derivative claim; and on the same day Eugene Leitensdorfer and Thomas Leitensdorfer, for $12,000 cash, made a like deed to Mr. Allen. (See exhibits R & S on pp. 11 & 13 of our "Answer to Motion of Appellant" as filed by us on the 31 October, 1885.)

It follows that on the 23 October, 1872, when Thomas Leitensdorfer filed his claim at Pueblo, he owned all of it, absolutely, and that, on the 4 May, 1877, when this suit was filed by him, he owned, through his sister and trustee, Josephine Farnsworth, an undivided seven-sixteenths' interest in his derivative claim.

She, as one of his witnesses, proved the existence of that interest in him at the time the suit began, (Transc., 425,) thus acquiescing in the suit by her *cestui que trust*.

It also follows that Thomas J. Allen now owns, as a buyer *pendente lite*, the whole interest of Thomas Leitensdorfer, Eugene Leitensdorfer and Josephine Farnsworth in this derivative claim, being the former seven-sixteenths held by Thomas Leitensdorfer and the former two-sixteenths held by Mrs. Farnsworth; and also owns the whole interest of those three persons and of John Hallum in sec. 24, and in the E. halves of sect. 28 & 32, T. 32 S., R. 63 W., and an undivided half interest in the Trinidad town lot, as quit-claimed by him to Mrs. Farnsworth on the 16 April, 1877. It will remain for a future suit to determine whether Mr. Allen, as the buyer of the whole derivative claim of Thomas Leitensdorfer, is not also the owner of Hallum's undivided seven-sixteenths in the claim at large, and of his remaining interest in the Trinidad town lot, on the ground that Hallum, by neglecting to pay the costs of the derivative claim, by abandoning the claim, and by stipulating with Craig's attorney for reversing the decree below against Craig, has forfeited his share in the proceeds of the claim.

Between the filing of this suit and the decree below, no sales were made by the owners of Leitensdorfer's claim. The effect of the sales made after that decree, will be examined under proposition V. The sales made before suit, were, as it appears, generally made to raise funds for prosecuting the derivative claim. For this purpose the claimants also from time to time, after the filing of the claim, made small relinquishments to the U. S. of parcels of land in the claim. Some of these relinquishments appear, though not in a very authentic shape, on pp. 64, *et seq.*, of "Evidence in behalf of Appellant in support of motion for rule to show cause." A number of them are in the transcript, (pp. 333–335;) but from the testimony, (*id.*, 86, & 340–345,) it is likely, that, in a proper proceeding, they will be ultimately held void for duress, forgery, &c. The relinquishments, when legal, were made for small sums of money paid by settlers wishing to homestead or pre-empt the tracts involved; but they were always made to the U. S., for the derivative claim was an equitable incumbrance on the federal title, and the relinquishments removed the incumbrance and enabled the government to at once dispose of the tracts relinquished, like any other of its unoffered public lands.

Assuming for the nonce that all of the relinquishments made in Thomas Leitensdorfer's claim are legal, they will, when eliminated from that claim, leave the following tracts and areas remaining to the claim; and the court can verify the computation by striking from the subdivisional diagrams of the claim, (Transc., between pp. 284, 285,) all of the subdivisions relinquished:

*In T. 32 S., R. 63 W.*

| | | |
|---|---|---|
| W. ½ of sec. 13, | 320 | acres. |
| Secs. 22, 23, and 24, | 1,920 | " |
| S. ½ N. E ¼, E. ½ S. W. ¼, and all S. E. ¼, of sec. 27, | 320 | " |
| E. ½ N. E. ¼ and S. W. ¼ N. E. ¼, E. ½ S. W. ¼, and all S. E. ¼, of sec. 33, | 360 | " |
| | 2,920 | " |

*In T. 33 S., R. 63 W.*

| | | |
|---|---|---|
| E. ½ N. E. ¼ and N. W. ¼ N. E. ¼, and all S. ½, of sec. 5, | 440 | " |
| N. ½ N. E. ¼, E. ½ S. W. ¼, and all S. E. ¼, of sec. 7, | 320 | " |
| E. ½ sec. E. ½ and N. W. ¼ of N. W. ¼, and N. W. ¼ S. W. ¼, of sec. 8, | 480 | " |
| E. ½ and N. W. ¼ of N. E. ¼, and all S. E. ¼, of sec. 18, | 280 | " |
| Secs. 19, 20, 21, 22, 23, | 3,200 | " |
| | 4,720 | " |

*In T. 34 S., R. 63 W.*

| | | |
|---|---|---|
| W. ½ of sec. 1, and all of secs. 2 and 3, | 1,600 | " |

*In T. 33 S., R. 64 W.*

| | | |
|---|---|---|
| S. ½ S. W. ¼ of sec. 13, | 80 | " |
| Sec. 24, | 640 | " |
| | 720 | " |

RECAPITULATION.

| | | |
|---|---|---|
| In T. 32 S., R. 63 W., | 2,920 | " |
| In T. 33 S., R. 63 W., | 4,720 | " |
| In T. 34 S., R. 63 W., | 1,600 | " |
| In T. 33 S., R. 64 W., | 720 | " |
| Total not relinquished, | 9,960 | " |

besides several thousand acres covered by coerced relinqushments. Many of the valid relinquishments were made after suit; but admitting that all of the relinquishments, voluntary and forced, were made before suit, it appears, from the above statement, that, when this suit was filed, this claim embraced at least 9,960 acres. Of this quantity, Thomas Leitensdorfer, as we have shown, was then the beneficial owner of 7 sixteenths, *i. e.*, as each section of 640 acres in the diagrams of his claim is divided into ¼ quarter sections, or sixteenths, he then owned 7 sixteenths, or 280 acres, in each section. Now, 7 sixteenths of 9,960 acres, the quantity not then relinquished, amount to 4,357.50 acres,

which, at $1\frac{1}{4}$ an acre, the minimum price of the public lands, are worth $5,446.87\frac{1}{2}$. This was the value of the interest of Thomas Leitensdorfer when he filed this suit. As we have also shown that Allen now owns that interest and 2 sixteenths more, *i. e.*, 9 sixteenths at least, his interest is now at least 5,602.50 acres, for which, as appears by his deeds, he paid $22,000.

So that the pecuniary interest of complainant suffices, and would suffice even deducting from it the half of it conveyed about the 1 August, 1873, before suit, by Hallum to the bubble Joseph S. Adams. But, as before explained, Leitensdorfer virtually proceeds on behalf of Adams if he has a share, before both the executive and judicial departments of the government. So long as the derivative claims of Leitensdorfer and Craig are, in law, pending before the executive, this suit must proceed in their names, for it is merely ancillary to the proceeding before the executive. Craig's title suspends the trial, by the commissioner, of all of the appeals of the derivative claimants. To remove that title was therefore essential. But whether the suit was brought by Leitensdorfer or by some other appealing derivative was not important. Hence, the thing in dispute now is Craig's title, not complainant's. Therefore, we do not ask the court to establish our title, and for this reason it only devolves on us to show a *prima facie* title, and to show that Craig's title, "the matter in dispute, exceeds, exclusive of costs, the sum or value of five hundred dollars," &c. (Act 3 March, 1875, 18 stat., 470.) We have fully shown both of these things.

But Stanton and Cook rejected Thomas Leitensdorfer's claim on the ground, mainly, that the original deed from the grantees to his brother Eugene Leitensdorfer was not produced before those officers, and had never been legally delivered. (Transc., 324.) Men who swallow a camel will strain out a gnat. Donaciano Vigil, who, as secretary for governor Armijo signed the order for placing the grantees in possession of this grant, (Transc., 252,) knew the grantees and Eugene Leitensdorfer, and proved before the register and receiver, that he knew the deed from the grantees to Leitensdorfer; that Judge Charles Beaubien, who was a witness to the deed, (*id.*, 287,) was authorized by the grantees to deliver the deed, through the witness, to Leitensdorfer, and that the witness, in 1849, after Leitensdorfer's return to Santa Fé, delivered it accordingly. (Transc., 288.) The absence of the original deed was explained by showing that it was in the hands of Hiram Crittenden in Saint Louis, who told witness "he intended to hold on to the deed until Leitensdorfer paid him." (*Id.*, 438.) This was in 1855. Simeon Hart says he saw the original deed in Crittenden's possession; that it was shown to him in June, 1871, by Crittenden; that he recognized Saint Vrain's signature to it; that the document A, annexed to

his affidavit, purports to be a translated copy, and that Crittenden had no deed, assignment, or translation of said paper, or the land mentioned therein to himself. (Transc., 289.) Eugene's possession under that deed, and the possession of Thomas under the deed from Eugene and S. M. Baird, are proved. (See Transc., 437, 435, 444, as to Eugene.) As to Thomas, see evidence of Walker about residence and improvements, (*id.*, 306 *et seq.*,) of Bright, (*id.*, 317,) of Smith, (*id.*, 318,) of Eugene, (*id.*, 419,) of Mrs. Farnsworth, (*id.*, 427,) of Hallum, (*id.*, 86,) of Calvin Jones, (*id.*, 297,) and of Gray. (*Id.*, 301.) He was Saint Vrain's agent, and his facts are very clear. See, too, Thomas Leitensdorfer's testimony. (*Id.*, 310.) Buster proves Craig's knowledge of complainant's title, and familiarity with it. (*Id.*, 111 *et seq.*)

The facts prove the delivery of the deed and land. No particular form of procedure is required to effect a delivery; it may be by acts merely, by words merely, or by both combined; but in all cases an intention that it shall be a delivery must exist. (1 Bouv. Law Dic., "Delivery," and cases there cited.) To complete a delivery acceptance must take place, which may be presumed from the grantee's possession; from the relationship of a person holding the deed to the grantee; and from other circumstances. (*Id.*) The delivery of the deed "will be presumed, in the absence of direct evidence, from the concurrent acts of the parties recognizing a transfer of the title." (Gould *v.* Day, 94 U. S., 405, 412.) And the *construction* of deeds is favorable to their validity. (Bouv. Law Dic., "Deed.") Neither the presence or express assent of the grantee is necessary to the delivery of a deed. (Merrills *v.* Swift, 18 Conn. 257; 4 Kent Com., 454 *n.*) After the deed was delivered to a third person, it was, by reason of such person's death, taken back by the grantor for safe keeping, and found among the papers of the grantor at his death; it was held a valid deed. (4 Kent Com., 454 *n.*) If a deed be signed, sealed, and declared by the grantor, in the presence of the attesting witnesses, to be delivered as his deed, it is an effectual delivery, if there be nothing to qualify the delivery, notwithstanding the grantee was not present, nor any person on his behalf, and the deed remained under the control of the grantor. "And more certainly would this be the case if the delivery were to a third person, for the use of the grantee, *though such third person were not the agent of the grantee, and the grantee should not receive the deed, nor know of its existence until after the death of the grantor.*" (4 Kent Com., 456, note *a*.)

Such are the authorities about the acceptance and delivery of onerous titles; but the deed of the grantees to Eugene Leitensdorfer was a donation *inter vivos*, and such deeds, under the law prevailing in Mexico, are sustained with a more liberal hand, "and the property belongs to the donee, as soon as the acceptance

is made, without the necessity of delivery." (Civil Law of Spain and Mexico, Schmidt, art. 987.) "If the donor die, before the donee has accepted, the donation remains in force and is obligatory on the heirs of the donor, who, in the event of the acceptance of the donation, must deliver the thing given, if it has not already been done." (*Id.*, art 981; Fuero Real, l. 10, T. 12, B. 3.)

The donation of Vigil and Saint Vrain to Eugene Leitensdorfer is badly printed on p. 290 of the transcript. It is correctly printed on p. 287. There it appears that the grantees "donate to Eugene Leitensdorfer and successors the one-sixth part of the land which our possessing in said locality embraces, withdrawing therefrom all our rights so that he to whom we execute this deed may enjoy *uninterrupted possession.*" These words intended that the donee should enter on and have exclusive possession of a specific part of the grant, for the donation does not declare that an undivided $\frac{1}{6}$ is donated. This is clear from the evidence of James S. Gray, who had been Saint Vrain's agent. (Transc., 302.) No formal partition was ever made or mentioned. But the possession under the donation was a partition in effect.

This is the view taken by congress. The *grantees* were strictly required to *locate* their assumed residuary claims; (act 25 February, 1869, S. 4, 15 stat., 275;) but the actual settlers, "holding possession under titles or promises to settle which have been made by said Vigil and St. Vrain, or their legal representatives," (*id.*, S. 1,) were not required to locate their claims, or to separate them from the mass of the grant, as that had already been done, in fact, by their separate actual settlements, which, under the statute, was a sufficient partition. So, though Vigil and Saint Vrain, under the original grant to them, were tenants in common, and though we can find no proof that they ever made partition of the land, yet S. 1 of the act of 1869 treats their hypothetical residuary claims as separate "claims of eleven leagues each," &c. The grant and derivative claims are *property*, a word embracing all titles, "legal or equitable, perfect or imperfect," (Hornsby *v.* U. S., 10 Wall., 224,) but inchoate property, (Chouteau *v.* U. S., 9 Peters, 147,) and the U. S. were under an obligation, perhaps, to protect and ultimately perfect the derivative claims; (3 Opinions, 720;) but the legislative power, on whom alone this duty devolved, could lawfully declare the conditions on which it would discharge this political obligation. (Craig's answer, Transc., 59; Beard *v.* Federy, 3 Wall., 478, 492; Colorado Co. *v.* Commissioners, 95 U. S., 259, 266, by justice Miller.) The case last cited involved the Gervacio Nolan grant, as confirmed by act of 1 July, 1870, 16 stat., 646; and the grant and act are almost identical with those now under discussion.

Such being the law, the practical question here is not whether Thomas Leitensdorfer's settlement and title are within the com-

mon law or the civil law, but whether they are within the act of 25 February, 1869. Now that act does not demand that his title be perfect, nor that he should have any title, in the strict sense of the word. Mere *promises to settle* persons on the grant, suffice if made to them by the grantees; and the act does not require that such promises should have been in writing. The vital requirement was settlement, but the authority under which the settlement was made, was a subordinate thing. This fact, and the fact that the grantees have no legal claim or title to any part of the grant, are admitted in Craig's answer. (Transc., 60.) If the settler was on the grant without a title or promise to settle, he was entitled to his 160 acres as a homesteader or pre-emptor, under the general laws as applied by s. 1 of the act of 1869. If he or his vendors had such title or promise, he was entitled, under that section, to an anomalous homestead for all the land embraced in his title or promise. The extension of the public surveys over the whole grant, under the second section of the act, shows that the U. S. treated it as public land, simply encumbered with an equity in favor of the derivative claimants.

So much for the sufficiency of the interest of Thomas Leitensdorfer. His brother Eugene is out of the statute, for he was not a settler at the date of the act.

V. LEITENSDORFER'S SALE TO ALLEN, *pendente lite*, DID NOT CAUSE THIS SUIT TO ABATE.

This court and the interior department, as we have shown, properly hold that new parties to the record cannot be made by sales of the land *pendente lite*. But no law forbids such sales by either party to this suit. "Lands shall not be inalienable," says the wisdom of the common law. The affairs of men cannot stand still to await the slow wheels of executive or judicial action. On the 21 August, 1874, twelve years ago, Craig wrote the commissioner urging an immediate consideration and decision by the commissioner of all the appeals of the derivative claimants then pending. (Transc., 396.) This he admits in his answer. (*Id.*, 63.) He also charges that the commissioner thereupon affirmed the decision of Stanton and Cook against complainant. (*Id.*) This is false, and is as improbable as false. Soon after his letter of 21 August, 1874, he began obstructing the decision of Leitensdorfer's claim and of his own, and his dilatory tactics were continued up to the end of the last term of this court. All of his energies have been directed towards delaying the trial of his claim and Leitensdorfer's on their merits, before the executive and judiciary. Therefore, for him and his counsel to plead now that this suit has abated by reason of the sale of either of the claims involved since 1874, would be an effort to take advantage

of their own wrong. All of the derivative claims would probably have been settled by the commissioner in that year had not Craig so effectually scotched the wheels of the commissioner's appellate jurisdiction.

Moreover, the sale to Allen could not cause an abatement of this suit, because that sale and the sales by Craig, being made *pendente lite*, have no effect at all on the suit. "The railroad company was a purchaser *pendente lite*, and was not entitled to be made a party to issues pending and undetermined when it purchased," said this court in Swann *v.* Clark, 110 U. S., 602, 607. In Whiteside *v.* Haselton, (*id.*, 296, 300–301,) the court, through Justice Miller, speaking of a decree against Haselton in a previous suit, said:—"It is argued that it does not bind the Bartow Iron Company, who are innocent purchasers from Haselton. But they bought *pendente lite*, and by the well-known rule on that subject, are bound by this decree." And in Tilton *v.* Cofield and *al.*, on appeal from the supreme court of Colorado territory, (93 U. S., 163, 168,) the court referred to the appellees as buyers *pendente lite*, and then added:—"After their purchase the court, the parties, and the *res*, stood in all respects as they stood before; and the judgment, sale and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence."

If such is the law, all buyers from Craig or Leitensdorfer, *pendente lite*, will be bound by the decision on their derivative claims in this court and before the commissioner, and the case must go on before both jurisdictions, in their names as the nominal parties. The prosecution of the suit in the names of Craig and Leitensdorfer, is "not inconsistent with an equitable and beneficial interest in another." (Cromwell *v.* County of Sac, 94 U. S., 351, 360, by justice Field.) "It is well settled that an assignment by a defendant of his interest in a litigation does not necessarily defeat a suit. His assignee taking *pendente lite* is bound by what is done against him. The assignee may, at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own name, or he may act in the name of his assignor. A *pendente lite* assignment carries with it *an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned.*" (*Per* chief justice Waite, in *Ex parte* Railroad Co., 95 U. S., 221, 226, where the assignment had been made below.) Craig's buyers, as we will show, are chargeable with notice of the flaws in his title; but Allen bought the title of Leitensdorfer on the 10 April, 1882, after the dismissal of Craig's first appeal on the 16 January, 1882. For this reason, and because it has never at any time, been in Allen's power to become a party to the record, (as Craig's buyers might have done below by supplemental bill or by an original

bill in the nature of a supplemental bill, 2 Dan. ch., 1517, *n.* 4, 5th ed.,) this court should protect his interest here and give him the control of this suit. As for Thomas Leitensdorfer, he swore that he had nothing to do with the cause after transferring his equitable title to Josephine Farnsworth on the 18 December, 1880. (P. 17 of our "Answer to Motion of Appellant.") Allen's ultimate purchase of all of the interests in Leitensdorfer's derivative claim is not ground for abatement in equity, but rather ground for protecting him. Generally speaking, if any property or right in liti gation is transmitted to another, he is entitled to continue the suit, or at least have the benefit of it, if he be plaintiff; Edwards, Receiv. 19; 9 Paige, Ch. 410; or it may be continued against him, or at least perfected, if he be defendant; Story Eq. Pl. § 332, 442; 7 Paige, Ch. 290. (All cited, 1 Bouv. Law Dic., "Abatement in Chancery Practice.") Especially should this court allow Allen to have the benefit of Leitensdorfer's suit against Craig, since Leitensdorfer is dead and the court had before taken a bond for costs from Allen.

As an effort has already been made by Craig's counsel to deprive Allen of the benefit of this suit, through an agreement with Hallum for reversing the decree below, and as other efforts of a like kind may be resorted to by reason of complainant's recent death and of the resulting change of the nominal parties, it is proper to show here that no counsel for such parties should be allowed to sacrifice Allen. "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a Court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create the impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it." (Holker *v.* Parker, 7 Cr., 436, 452–'3, by Marshall, C. J.)

Here, there is no pretence that Hallum, or any persons but the undersigned, have ever been employed in this court by Allen. (And see p. 20–21, of our "Answer to Motion of Appellant.")

So, in Platt *v.* Jerome (19 How., 384, 385), where the writ of error was dismissed in this court in consequence of an agreement of those parties to settle and discontinue the cause, the court said: "No doubt, if either party had assigned his interest to a third person, by which such third person had become possessed of the beneficial interest, and the party to the record merely nominal, the court would protect such interest, and give him the control of the suit." In the present suit, no decree is possible against complainant or Allen save for costs, and Allen's bond shows that he is able to respond to such a decree. Allen asks no decree establishing his title, but simply asks an affirmance of the decree below against Craig's title, in order that the commissioner may then go on and decide the claim of Leitensdorfer for its true owner. However the derivative claims of Craig and Leitensdorfer, in the shape in which they are now pending before the commissioner, may have been transferred or subdivided, they still exist there unchanged, so that the decisions of the commissioner on them, subject to appeals to the secretary, will reach every parcel and owner of them, depriving the owner of his title, where the decision is adverse, or confirming his title where the decision is favorable.

VI. THE DECISIONS OF THE REGISTER AND RECEIVER FOR CRAIG AND AGAINST LEITENSDORFER ARE NOT FINAL, AND LEITENSDORFER'S APPEAL FROM THOSE DECISIONS, NOW PENDING BEFORE THE COMMISSIONER, SHOULD BE TRIED.

The powers of Stanton and Cook are founded on section 1 of the act of 25 February, 1869, 15 stat. 275, which provides that the bounds of the Cornelio Vigil and Ceran St. Vrain claims, of 11 leagues each, shall be adjusted according to the lines of the public surveys; "and the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives prior to the passage of this act, who may establish their claims within one year from the passage of this act, *to the satisfaction of the register and receiver of the proper land district*, shall in like manner be adjusted," &c.

*This is a public act;* for it affects 714 actual settlers under a very general classification (transc., 380–394); it affects, besides, about 62 derivative claimants, referring to them solely by a general classification (*id.*, 368–379); it involves 4,096,345 acres—all public land, save, perhaps, 97,650.96 acres confirmed (*id.*, 253, 402, and eye-draft opposite 347); it embraces parts of the large counties of Las Animas, Bent, Huerfano, and Pueblo, in Colorado (*id.*); and it names no specific land district, register, re

ceiver, surveyor general, commissioner, derivative claimant, or other settler. Such an act would be a public one by common law; (4 Report, 79; Jones *v.* Axen, 1 Ld. Raymond, 119; and especially Rex *v.* Rawlyn, Siderfin, 209); but in the U. S. the disposition has been "to enlarge the limits of the class of public acts;" so that "generally if the act affects in any way public interests, it will be held public." (Sedgwick on Stat. and Const. L., 32, 33, ed. of 1857.) *E. g.*, 11 Tex., 698; 7 Mass., 9; 8 Black, 508; 8 How., 569; 10 *id.*, 511; 4 Cr., 384; 3 Cowen. 662; 1 Missouri, 20; 10 Mass., 91; 5 *id.*, 268, 324; and especially 9 Greenleaf, 54.

*The act of* 25 *February*, 1869, *is not a contract.* Vigil and Saint Vrain have no interest in it, for their grant was imperfect, and congress constitutionally reduced it to 97,650.96 acres, and preferred the derivative claimants to those grantees, and the confirmed area is not enough to satisfy the derivative claims. Craig's answer "admits that the only persons having any interest in said 22 leagues are and were the derivative claimants," (Transc., 60,) and that the acts of 21 June, 1860, and 25 February, 1869, treat them "more as anomalous homesteaders than as confirmees." (*Id.*) To the 714 actual settlers on the grant without the authority of the grantees, the act of 1869 applies the general homestead and pre-emption systems. (Sec. 1.)

If the act of 1869 be a public one, and not a contract, it must be construed accordingly, and it will be shown below that, thus construed, the decisions of Stanton and Cook are subject to revision by the commissioner and secretary. The power of congress is supreme in this matter, *for the grant, the hypothetical claims of the grantees, and the derivative claims, are, to say the least, imperfect, and are therefore only valid so far as congress has made them so.* No one person was allowed by Mexico to get the ownership of more than 11 leagues. (1 Rockwell's Span. and Mex. L., 452.) But this grant has 922 leagues. It was therefore beyond the jurisdiction of governor Armijo, and, being so, was void. (Elliott *v.* Peirsol, 1 Peters, 328, 340.) Besides, there was no grant in law. There was the usual preliminary decree of juridical possession, and the usual livery of seisin, and nothing more save an eye-draft. These things do not constitute a grant. (Hornsby *v.* U. S., 10 Wallace, 224; Spaulding on Pub. Lands, § 513.) Congress was therefore free to treat the grant as they have treated it. (Beard *v.* Federy, 3 Wall, 478, 491.)

*The confirmed claims of Vigil ana Saint Vrain are imperfect too.* They are unsurveyed relinquishments, (Act 21 June, 1860, s. 4, 12 stat., 71,) and such *mere* relinquishments that even the settlements of homesteaders and pre-emptors are superior to the claims of the grantees. Moreover, the confirmation of 1860, has never, as we have shown, become "legally effective" in the words of the act of 1869, s. 2.

*The derivative claims, also, are imperfect.* A stream may fall below its source, but can never, of its own force, rise above it. As the grant and confirmation, with respect to the grantees, are at least imperfect, the titles, &c., derived from the grantees cannot be intrinsically perfect. The derivative claims have never been severed from the domain by approved surveys, and the law regards them as settlement rights, not treating them even as equities unless sustained by actual settlement; and hence the sole legal right which Craig and Leitensdorfer have, is the right to have the pending appeals tried before the commissioner. Their titles can never become truly legal until the commissioner sanctions them on their merits, and causes legal, approved plats to issue for enforcing that sanction.

*If the grant, the claims of the grantees, or the derivative claims, be perfect, congress, to disencumber the domain from them, may still prescribe reasonable conditions and limitations to the enforcement of such perfect titles.*

The enforcement of contracts and even of judgments, is barred by statutes of limitation. So congress often imposes duties and conditions on the owners of perfect land grants, and denounces nullity against the evidences of title, in case of disobedience. (*E. g*, acts 25 April, 1812, s. 4, 2 stat., 713; 27 February, 1813, s. 1, 2 stat., 807; 11 May, 1820, s. 2, 3 stat., 573, chap. 87.) These acts reach all claims, perfect or imperfect, without distinction. So, though the general swamp land grant of 28 September, 1850, (9 stat., 519,) to the states, is a present grant, (R. R. co. *v.* Smith, 9 Wall., 95; 9 Opinions, 41, 253;) yet the act of 12 March, 1860, (12 stat., 3,) in order to quiet titles, prescribes a very short limitation within which the selection of swamp lands "shall be made." See, too, Jackson *v.* Clark, 1 Peters, 628. Here, the act of 1869, s. 3, intends that the approved plats to be furnished under the commissioner's instructions, after he decides the derivative claims on their merits, shall vest the fee. When the fee passes, the political department will be *functus officio*. Till then, the fee is in the U. S. and those claims are under the commissioner's supervision, in subordination, of course, to the final controlling executive power of the secretary. As such important consequences will flow from the lawful delivery of the plats, the law requires them to be made, approved and delivered under the commissioner's instructions; (act of 1869, s. 3;) for by an old and wholesome legislative custom, when an officer, subordinate to the commissioner, is empowered to grant the ultimate evidence of title, or a paper on whose presentation the commissioner shall issue such ultimate evidence of title, the law, in view of the importance of the function of such subordinate, usually invests the commissioner with special control, by instruction or revision, over the exercise of that

function; (acts 18 April, 1814, s. 2, 3 stat., 139, c. 93; 3 March, 1819, s. 12, 3 stat., 528; 2 June, 1858, s. 4, 11 stat., 294; private act 21 June, 1860, s. 3, 12 stat., 886; act 20 May, 1862, s. 6, 12 stat., 392; &c.;) and this, though such function of the subordinate officer is always necessarily ministerial or executive, and though the act of 4 July, 1836, s. 1, (5 stat., 107,) which antedates all but the first 2 of the acts cited, itself gave the commissioner general supervision and control of all such executive acts, and necessarily, therefore, of all such ministerial acts. The act of 1836 enabled the commissioner to control the plats provided for by s. 3 of the act of 1869. Hence the words of that section, giving him control of them, are mere surplusage, born of abundant caution suggested by the acts above, passed before the act of 1836; and therefore those words cannot found the argument that the *decisions* of Stanton *v.* Cook are independent of the commissioner's supervision because the act of 1869 does not expressly vest the commissioner with the control of them. Sec. 1 of the act of 1836 is now of course suspended by R. S., § 453, 2478, which enlarge the powers of the commissioner, and rescind those of the president, whatever they were, under the act of 1836.

We have pressed these views of the legal nature of these derivative claims, because Craig's counsel have heretofore insisted on a different view of the law, investing those claims with the sanctity of treaty protection. As to their argument, adverted to above, that the act of 1869 meant to exclude the decisions of Stanton and Cook from the commissioner's revision, because it expressly subjects the approved plats to his control, it may be observed that the analogies of the act of 2 June, 1858, (11 stat., 294,) point to a different conclusion. The practical construction of that act was strongly relied on by secretary Delano, in his able decision of Craig's case, to show that the decision of Stanton and Cook for Craig was appealable. (Transc., 411, 401.) The act of 1858 embraces, besides a multitude of confirmed claims not specified, certain named claims confirmed by the act. Under the act, as well as under the private act of 21 June, 1860, (12 stat., 866,) the confirmes interested had their option to have their claims located, or on proof *to the satisfaction of the surveyor general* of the confirmation of their claims, and of the non-location or non-satisfaction of their claims, to get from him indemnity certificates of location. The acts provide for no revision of these certificates by the commissioner, nor do they empower him to issue instructions; and, to complete the analogy to the act of 1869, they grant the commissioner a special revisory power over the patent certificate of entry, to be issued by the register and receiver to the holders of the certificates of location, on entry. Yet

the commissioner and secretary have constantly exercised supervision and control over the indemnity certificates granted by the surveyors general under these acts of 1858 and 1860, (transc., 401,) and "the right of such supervision and control has never been questioned," said the secretary. (*Id.*, 411.) On these and other grounds the commissioner and secretary hold that appeals lie from Stanton and Cook to the commissioner under the act of 1869. (*Id.*, 328, 411.)

Surely it is reasonable to extend the general appellate power of the commissioner and secretary to the decisions of Stanton and Cook. Why should congress wish to exempt their action from the general supervision of their superior officers? The history of registers and receivers generally and of Stanton and Cook particularly, affords many reasons why the power of the commissioner and secretary should be firmly maintained over such officers; and those reasons are strengthened with respect to the act of 1869, by the large number of its beneficiaries and the value of their interests. "Grants of immunity from governmental control are never to be presumed," said chief justice Waite, delivering the opinion of the court in Ruggles *v.* Illinois, 108 U. S., 526, 531. Yet appellant holds that neither the executive nor judiciary has power to review the decisions of Stanton and Cook. We admit that those men, in exercising their powers, could not be coerced by *mandamus* or restrained by injunction; (Gaines *v.* Thompson, 7 Wall., 347; Secretary of the Interior *v.* McGarrahan, 9 Wall., 298; and especially Litchfield *v.* Register and Receiver, 9 Wallace, 575;) and admit that the courts cannot entertain appeals from their decisions. But it is this exemption from judicial control which necessitates the commissioner's revisory power. Moreover, registers and receivers are not required to be lawyers. They are without a clerk, counsel, library, or marshal, and have no means for compelling the attendance of witnesses, and no facilities for eviscerating the facts and law of any case. To exempt them from control would offer a premium to error and iniquity. Does the law provide for revising the decisions of circuit courts, district courts, and the court of claims, and in some cases for revising acts of congress and judgments of the supreme court, and yet place the stamp of omnipotence on the green and salid fiats of these petty officers? Are garments, too large for giants, to be worn by pigmies?

*If the decisions of Stanton and Cook be technical awards as claimed by Craig, which we deny, still the commissioner may review them.* An award of a board of commissioners is not a judicial act, (U. S. *v.* Ferreira, 13 How., 40; League *v.* De Young, 11 How., 185;) but an executive act; and the fact that the award involves judgment and discretion makes it executive; (Decatur *v.* Paulding,

14 Peters, 497;) otherwise it would be simply ministerial, for a ministerial duty "is one in respect to which nothing is left to discretion." (Mississippi *v.* Johnson, 4 Wall., 475. 498.) For examples of ministerial duties, see Marbury *v.* Madison, 1 Cr., 137, and Kendall *v.* U. S., 12 Peters, 524. Registers and receivers are executive officers because they use judgment and discretion. (Litchfield *v.* Register and Receiver, 9 Wall., 575, 577.) If so, they are within the act of 4 July, 1836, § 1, and within the sections of the revised statutes substituted for it, and so are subject to the commissioner's supervision.

And the awards of Stanton and Cook, if they were commissioners, could only have been final between the U. S., and Vigil and Saint Vrain, and its finality as to them does not preclude citizens from setting up hostile or conflicting claims to the quantities of land awarded. (Comegys *v.* Vasse, 1 Peters, 194, 212; Freval *v.* Bache, 14 Peters, 95; and especially act 3 March, 1849, § 8, 9 stat., 393.) If Stanton and Cook had power to settle forever whether the title was out of the government, it does not follow that they could decide irrevocably *in* whom the title had vested; for the act of 1869 did not contemplate that claimants should file, before the register and receiver, adverse claims against each other and so test the relative merits of hostile pretensions. Such conflicts may be settled by the department and the courts, after the preliminary adjustment by the register and receiver. "We announce this to be the settled doctrine of this court," said justice Catron in the analogous case of Garland *v.* Wynn, 20 Howard, 6, 8.

But the power of Stanton & Cook was not absolute. To hold the contrary, is to allow those men a power denied to the secretary and to the courts, which is absurd. "Every interpretation which leads to an absurdity, ought to be rejected." (Vattel's 15th maxim, Potter's Dwarris, 128, ed. of 1871.) "When the legislature have not expressed their will in terms that are precise and perfectly determinable, it is to be persumed that they desire what is most equitable." (Vattel's 31st max., *id.*, p. 130.)

The act of 1869 must be read, not by itself, but with other acts in *pari materia*. Paffendorf says: "It gives great light to the interpretation of obscure passages, to compare them with others that have some affinity with them." (Potter's Dwarris, 133.) Grotius says: "When the words of a law, contract or will are capable of two or more senses, so that the meaning of the writer is left doubtful, what has been spoken or written by the same law maker, testator or contractor upon some other occasion, is a *circumstance* of the doubtful writing." (*Id.*, 136.) And the American rule is that "All statutes in *pari materia* are to be read and construed together, as if they formed parts of the same statute, and were enacted at the same time; (*Id.*, 145,) for "It is to be inferred, that a code of statutes relating to one subject, was gov-

erned by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." (*Id.*, 189.)

The act of 1836 formerly, and now art. 453, R. S., are remedial, so far as they give Leitensdorfer a right of appeal to the commissioner and secretary, (*id.*, 73,) and are hence *to be liberally construed.* (*Id.*) "This rule," says Dwarris, (*id.*, 231,) "applies especially in statutes giving a right of appeal, which are to be liberally construed as in furtherance of justice." (*Id.*, 231, n. 31.) And if, as has been argued by Craig, the act of 1869 is private, and creates a new jurisdiction, it must be strictly construed; that is to say, as the act does not declare that the decisions of the register and receiver are unappealable, therefore they may be reviewed. "Private acts of parliament, conferring new and extraordinay powers of a special nature upon particular persons, affecting the property of individuals, or giving exemption from a general burden attaching by law upon all parties, shall receive a strict interpretation." (Potter's Dwarris, 257, and cases there cited.) "A statute creating a new jurisdiction ought to be construed strictly. *And the jurisdiction of the superior courts ought not to be ousted but by express words or necessary implication.* Tindall, C. J., in delivering his judgment in Crisp *v.* Banbury, where the words were 'that the matter shall be referred to the arbitration of,' &c.; fully recognizes this proposition." (*Id.*, 259, and cases there cited.)

Now, the act of 1869 does not oust the jurisdiction of the department or courts by "express words." And so far from the statute ousting that jurisdiction by "necessary implication," the implication, as derived from the acts in *pari materia*, cited below, is the reverse; and in all cases of implication the American rule is:—"That which is implied in a statute, is as much a part of it as what is expressed." (Potter's Dwarris, 145, ed. of 1871; U. S. *v.* Babbitt, 1 Black, 55, 61; Gelpcke *v.* City of Dubuque, 1 Wall., 220, 221.)

The derivative claims under the act of 1869 belong to the class of public lands or private claims. If they belong to the former, they must be anomalous homesteads; but no homestead can exist independently of departmental supervision. (R. S., §§ 441, "Second;" 2289; 2478.) If they belong to the latter, which is the view most favorable to Craig, then the act of 1869 is one of the class of acts for adjusting private land claims; "but they constitute a land system, are all *in pari materia*, and in explaining their meaning and import, are to be regarded as one statute." (Ryan *v.* Carter, 93 U. S., 78, 84; Patterson *v.* Winn, 11 Wheat., 380, 386.)

*Stanton and Cook were not arbitrators, or commissioners, or a court, and hence their decisions are not awards or judgments.* They have none of the ear marks of such boards or tribunals. A re-

view of the acts creating boards of land commissioners will prove this. See acts 3 March, 1803, S. 6 *et seq.*, 2 stat., 229; 26 March, 1804, S. 4 *et seq.*, 2 stat., 277; 2 March, 1805, S. 5 *et seq.*, 2 stat., 324; 25 April, 1812, S. 1 *et seq.*, 2 stat., 713; 8 May, 1822, S. 1 *et seq.*, 3 stat., 709; 3 March, 1851, 9 stat., 631; 22 July, 1854, S. 89, 10 stat., 308; 22 June, 1860, S. 1–9, 12 stat., 85; 3 March, 1877, S. 2 *et seq.*, 19 stat., 377, &c. These acts prove that where the legislative power intends to invest a board with final jurisdiction, elaborate machinery is provided to guard the interests of the government and people; to insure truth and justice and a thorough examination; to avoid surprise, fraud and error, and to secure confidence and respect for the findings of the board.

*When the decisions of such boards are intended to be conclusive, the board always consists of an odd number, usually, 3, and the act declares their decisions final.* For instance, the boards for the Louisiana purchase, created by act 2 March, 1805, S. 5 *et seq.*, (2 stat., 324,) were afterwards allowed, in a specific class of cases, to render a final decision, "which decision of the commissioners" says the act, "when in favor of the claimant shall be final, against the United States, any act of congress to the contrary notwithstanding." (Act 3 March 1807, s. 4, 2 stat., 440.) See, also, acts 3 March, 1791, s. 4 and 6, 1 stat., 221; 3 March, 1803, s. 6, 2 stat., 229; 8 May, 1822, s. 5, 3 stat., 709; 3 March, 1823, s. 1, 3 stat., 754. But there is no act which calls the register and receiver in this case a court, or commissioners, or arbitrators; nor do they call themselves so; nor has the bureau or department ever called them so; nor is there any act which calls their findings awards or judgments. The act of 25 February, 1869, does not create any board or officer, or give the proper name of any officer, or state the location of the office or district of the men whose decisions were sought by attorney general Pierrepont to be made conclusive on the executive. (15 Opinions, 94, 104.) Nor does the act provide an umpire in case the register and receiver should differ, or attribute finality to their action, or call their action a decision. Two lines, parenthetically interjected in s. 1 of the act, create, according to appellant, a full court, with power to forever bind the government and citizens in cases involving, perhaps, half a million of property. Assuming that the act of 1869 intended to leave the register and receiver, and their action, to the lawful and customary supervision of the bureau, such crudeness is intelligible.

The act of 3 March, 1877, s. 5, (19 stat., 377,) provided, with respect to the Hot Springs reservation in Arkansas, that the board of 3 commissioners, created by the act, shall "finally determine the right of each claimant or occupant to purchase the" land or part of it. But, said a majority of this court in Rector *v.* Gibbon (111 U. S., 276, 288), by justice Field, this

clause does not withdraw the board's "decisions from the correcting power of the court when the board has misconstrued the statute, and thus defeated its manifest purpose," &c. So in Johnson *v.* Towsley, 13 Wall., 72, the direct question was as to the effect of s. 10 of the act of 12 June, 1858, (11 stat., 319, 326,) which declared that appeals in contests between preëmptors should thereafter be decided by the commissioner, "whose decision shall be final, unless appeal therefrom be taken to the secretary," &c. But the court held that errors of law by the commissioner might be corrected in equity. So the Florida act of 8 May, 1822, s. 5 (3 stat., 709), gave the board of 3 commissioners created by the act "power to inquire into the justice and validity of the claims filed with them," and declared that the board, "if satisfied that said claims be correct and valid, shall give confirmation to them: *Provided*, that such confirmation shall only operate as a release of any interest which the United States may have," &c. But, in U. S. *v.* Percheman, (7 Peters, 51, 90,) chief justice Marshall said "that the object for which this board of commissioners was appointed was to report to congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term 'rejected' or in any other manner, is not to be considered a final decision," &c. Favorable decisions by the Florida commissioners were always confirmed by act of congress: *e. g.*, act 22 April, 1826, 4 stat., 156.

But in Craig's case, the power to correct errors of law is not limited to equity. Under the act of 4 July, 1836, s. 1, and the revised statutes which now supersede it, the commissioner and secretary may review the action of Stanton and Cook. This results from Brainard *v.* Ashley, 18 How., 43, which has been repeatedly approved since: *e. g.*, Garland *v.* Wynn, 20 How., 6, 8. These cases arose under the old pre-emption act of 29 May, 1830, s. 3, (4 stat., 420,) providing "That prior to any entries being made under the privileges given by this act, *proof* of settlement or improvement shall be made *to the satisfaction of the register and receiver* of the land district in which such lands may lie, agreeably to the rules to be prescribed by the commissioner," &c. The act provided for no appeal to the commissioner, and it was therefore held, up to the act of 4 July, 1836, that none would lie. (3 Opinions, 93, 94, 126; and see 1 *ib.*, 290, 293.) But, from the date of that act to this day, the supervisory power of the commissioner has been constantly maintained. In Barnard *v.* Ashley, it seems the register and receiver had rejected Barnard's proof and right, preferring the conflicting pre-emption of Ashley; and so it was insisted for Ashley, before this court, that the register and receiver, having, on due proof and examination, rejected Barnard's pre-emption under the act of 29 May, 1830, s. 3, and

the reviving act of 19 June, 1834, (4 stat., 678,) "acted in a judicial capacity, and their judgment, being subject to no appeal, is conclusive." (18 How., 44.) But the court said that the act of 4 July, 1836, s. 1, changed the power of the register and receiver as to acts done by them after its passage; (*id.*, 45;) and the court added:—"But if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety." (*Id.*) Thirty-one years more of undeviating and almost infinite practice have since added their sanction to the former practice and to this decision. Now, "A contemporaneous understanding of a statute, corroborated by an undeviating usage of thirty years, must govern its judicial construction." (Dwarris on Stat., 693; 3 Pick., 517; 1 Cr., 299; 5 Cr., 22; 2 Mass., 477; 17 Mass., 144; 1 Blatch., 218; Brown *v.* U. S., 113 U. S., 568, 571.)

The grant of revisory power to the commissioner by the act of 1836 is limited to executive duties, only to avoid the incongruity of an attempt to vest in an executive officer functions sacred to congress or the courts. The act of 20 April, 1832, (4 stat., 506,) and several others, then in force, presented grave judicial duties relating to private claims of land; so that the limitation mentioned in the act of 1836 was designed to protect such duties from the possible interference of an executive bureau officer.

If, as shown above, the decisions of the register and receiver for Craig and against Leitensdorfer are not final, Leitensdorfer's appeal from those decisions, now pending before the commissioner should be tried, and the president had no power to oust the appellate jurisdiction, directly or indirectly, as will be shown more clearly under point

VII. THE PRESIDENT HAD NO POWER TO REVIEW THE FINAL, DELIBERATE DECISION OF THE SECRETARY SUSTAINING THE COMMISSIONER'S APPELLATE JURISDICTION, AND NO POWER TO AWARD THE TITLE TO CRAIG, AND THAT TITLE WAS VOID.

The commissioner's order of 13 March, 1874, to Stanton and Cook, (Transc., 328.) allowing appeals from their decisions, an order which Craig sought indirectly to reverse by his appeal to the president, was an unappealable instruction to the commissioner's subordinates against which they alone could protest. Craig should have ultimately filed with the commissioner a plea to the jurisdiction, and asked a decision on it. This he never did. On the contrary, on the 21 August, 1874, he wrote the commissioner urging an immediate consideration and decision by the commissioner of all the appeals then pending from the decisions of Stanton and Cook, (Transc., 396,) thereby admitting the commissioner's appellate power. Besides, the commissioner's

general order allowing appeals was notified by Stanton and Cook to Craig on the 20 March, 1874. As more than 60 days elapsed after the notice before Craig took any step in the nature of an appeal from the order, the appeal was barred. (Secretary's decision, Toll *v.* Pettingill, Washington Law Reporter of 20 July, 1875, p. 220.)

But, on the 1 October, 1874, Craig wrote the commissioner denying the appellate power of the commissioner, and asking that the commissioner's order of 13 March, 1874, to the register and receiver, allowing the appeals, might be vacated and the appeals dismissed. (Transc., 347, 358.) On the 14 October, 1874, the commissioner replied, (Transc., 397,) that Craig's letter of 1 October, 1874, would be treated as an appeal to the secretary of the interior from the order of 13 March, 1874. The case was accordingly sent to the secretary, Columbus Delano, who, after argument for Craig, rendered a full opinion and decision on the 27 October, 1874, sustaining the commissioner's revisory power over the decisions of Stanton and Cook. (Transc., 399; 1 Copp's Land Owner, 122.) This appeal to the secretary estopped Craig "from denying the jurisdiction of this Department to pass upon the whole record." (3 Decis. of Dept. of Int. relating to Pub. Lands, 562. And see *id.*, 608.) The secretary acted on Craig's case in virtue of his supervisory powers over the commissioner as granted by the act of 25 April, 1812, s. 1, (2 Stat., 716,) the act of 3 March, 1849, S. 3, (9 stat., 395,) organizing the interior department, and §§ 441, 453, of the revised statutes, which had been adopted on the 22 June, 1874, (R. S., p. 1085, ed. of 1878,) before Craig appealed to the secretary or president.

Afterwards Craig made a motion to review the secretary's decision, and the motion was thoroughly argued *pro* and *con* before secretary Delano in person. A decision was rendered on the 23 January, 1875, thoroughly sifting the Vigil and Saint Vrain grant, and the whole question of the commissioner's revisory power, and affirming the power. (Copp's Pub. L. Laws, 611, ed. of 1875; 1 Copp's Land Owner, 165; *Transc.*, 401.)

These final deliberate decisions, being within the secretary's jurisdiction, (Magwire *v.* Tyler, 1 Black, 195, 202,) could not be impaired by his successors, or by any authority short of the judiciary, and do yet bind the executive. Craig is estopped to question the appellate jurisdictions of the commissioner and secretary, for, as has been just shown, he invoked both. Yet, about the 25 May, 1875, "by some means not apppearing of record," as the commissioner states in his report on the case, (Transc., 174,) Craig informally appealed to the president from the secretary's second decision. The president then referred the case to attorney general Pierrepont, on Craig's *ex parte* statement of 1 October, 1874, (Transc., 347,) who rendered an opinion on the 15 May,

1876, (15 Opinions, 94, 104,) on which the president, upon the 2d March, 1877, ordered Craig's plat to issue. (Transc., 228.) The commissioner accordingly delivered the approved plat to Craig, after the dissolution of Leitensdorfer's restraining order. (Answer, Transc., 68.) After this, on the 8 January, 1878, a quit claim patent for the same land issued to Craig, (*id.*, 229,) under color of R. S., § 2447, (*id.*, 234,) and was delivered to him here in person, on the 11 January, 1878. (*Id.*, 228.) There was no motion, petition or order for the appeal to the president. No transcript of appeal was filed; and Craig's case was presented to the president without the knowledge or consent of the secretary, of the commissioner, or of any of the opposing parties or counsel, at the time.

The attorney general is the head of that executive department called the department of justice, (R. S., § 346,) and under sec. 2 of art. II of the constitution the president "may require the Opinion, in writing, of the principal Officer of each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," &c. When such an opinion is required by the president, or by the head of any executive department, the attorney general must render it. (R. S., § 354, 356, 358.) As the enforcement or supervision of the decisions of Craig and Stanton, was a subject relating to the duties of the secretary of the interior, and not to the duties of the attorney general, it would have been better, perhaps, for the president to have referred Craig's application to the secretary, who had ready access to the whole record, and understood the case. The attorney general, however, being asked by the president for his opinion, gave it; but it was a mere opinion, and was simply advisory, not mandatory, (Opinions, V, 390; VII, 692; IX, 32; XI, 467.) The attorney general, said Mr. Black to the secretary of the navy, (IX *ib.*, 32, 36,) "aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own."

The opinion of Mr. Pierrepont was against law in holding that the decision of Stanton and Cook for Craig was conclusive, and in holding that the president could review the decision of Secretary Delano; and we think the president should have followed the law rather than the opinion, and would have done so had he known the whole case, and known what the record in this suit discloses respecting the indirect bribery of Stanton and Cook by Craig.

If the president had power to review Secretary Delano, which we deny, it was impossible for him lawfully to exercise his revisory power here; for *First.* No officer can review a case unless the case is before him, and here the president and Mr. Pierrepont

had not the record before them, nor any transcript of the record. Craig's unsworn statement of his own claim was all they had.

*Second.* It is impossible for an officer to legally exercise a revisory appellate power, without notice to the officer whose action is reviewed, and notice to the parties whose interests are involved, and those forms which usage and reason dictate for the purpose of securing a fair hearing and a just decision. Here, Craig disregarded all such notices and forms.

*Third.* The prime object of the application to the president was to obtain the approved plat; but the question of the plat was not, at the time, legally before the president. There is no evidence at all that Craig had ever applied to the surveyor general for the plat; nor did he apply to the commissioner or secretary for it; nor was his right to a plat in controversy before any of those officers, otherwise the record here would contain their decisions, but it does not. Craig should have first applied to the surveyor general for the plat, and, in case of a refusal by that officer, he should have appealed to the commissioner, and in case of a refusal by the commissioner he should have appealed to the secretary. If the president may review a decision, he cannot do so before it is rendered.

But the president had no power in any case to review the final action of Secretary Delano here. *From such a decision it is certain no appeal lies to the attorney general.* (Opinions, III, 39, 309; VI, 289; XII, 433.) Attorney general Black, in a land case, said:—"But even if the decision of the Interior Department had not been manifestly correct, it would still be my duty to take the legal justice of it for granted. It is conclusively presumed to be right. I have no authority to overturn or even to impugn a judgment pronounced by one of the other Executive Departments, to whom jurisdiction over the subject matter has been given by law." (Land Laws, Regulations and Decisions. Lester, I, p. 694.) Had the secretary needed Mr. Pierrepont's opinion here, he would have asked it.

*That no direct appeal lies to the courts* from the decision of the head of a bureau or department, is as clear. (Commissioner of Patents *v.* Whitely, 4 Wall., 522, 534; Decatur *v.* Paulding, 14 Pet., 515; Gaines *v.* Thompson, 7 Wall., 347.)

*Nor could secretary Delano's decision here be reviewed by a successor,* save on newly discovered evidence, which would probably have changed that decision but could not be produced with ordinary diligence. (Copp's Pub. L. Laws, 605, ed. of 1875; Opinions, II, 8, 463,—IV, 341, 429,—V, 28, 122,—IX, 100, 300, 387,—XII, 355, —XIII, 33, 226, 387, 456; U. S. *v.* Bank of Metropolis, 15 Pet., 401.) And we will show below that the president had no more power to review secretary Delano, than has the secretary's successor, or the attorney general, or a court. It is because no appeal,

direct or indirect, lies from the head of a department to his successor, or to the attorney general, or to the president, or to the courts, that the latter, after the department has finally disposed of the matter, will, in a proper case, be swift to redress any wrong which a party may have suffered from such executive action. (Commissioner *v.* Whitely, 4 Wall., 522; Gaines *v.* Thompson, 7 *id.*, 347; Litchfield *v.* Register and receiver, 9 *id.*, 575; Johnson *v.* Towsley, 13 *id.*, 72; Warren *v.* Van Brunt, 19 *id.*, 646,) and will not be bound to adopt the construction of law given by the head of the department, (Greely *v.* Thompson, 10 How., 225,) but will, if they think his decision wrong, so pronounce their judgment. (Decatur *v.* Paulding, 14 Pet., 497.)

Would the law thrust on the president an appellate jurisdiction denied to the attorney general and the courts, with their superior advantages for investigation? It was early settled that the executive will not interfere in private litigation to protect one of the people; (1 Opinions, 405;) and it is not in reason that he should cumber himself with appeals from the bureaus and departments, for that would be incompatible with the discharge of his large, unquestionable, constitutional duties. Those duties can be discharged by him alone, and should not be pushed aside by questionable investigations which can be better made by others. "He shall take Care that the Laws be faithfully executed," (Const., Art. II, sec. 3,) but he is nowhere enjoined to execute them personally. The decisions of the heads of departments are numerous and often intricate. They probably much exceed a hundred a day. If the president resolves himself into a court of errors and appeals, and tries to review those decisions, he will have no time for anything else, and the people must amend the constitution, and create some assistant presidents, and require that all of the presidents be learned in the law. Losing men generally deem themselves wronged, so that, if an appeal lies to the president from the decision of the head of a department, every man who loses an important case in the departments will appeal to the president.

The 9 judges of this court, with all their facilities for trying cases, cannot keep pace with a docket of 400 cases a year. How will one president, with none of those facilities, keep pace with a docket gaining at the rate of 100 cases a day, or 36,500 a year? Shall the novel executive court be one of law, or of equity, or of both? What shall be the rules of procedure? What delay shall bar an appeal or writ of error? Shall the jurisdiction of the president's court hinge on the value in dispute, or on the residence of the parties, or shall it be limited to constitutional questions? Will the president belong to the executive department, or to the judicial department, or to both, or to neither? Shall the appeal to him be of grace or of right? Shall it be solicited *ex*

*gratia* or demanded *ex debito justitiæ*? Shall the petition of appeal be addressed to the president's head, or to his heart? We ask this question because, if Craig's appeal to the president should grow into precedent, it will be neither necessary or proper to present a petition or motion of appeal before the head of a department whose decision is sought to be overthrown.

The necessity of asking these questions shows that the president has no appellate power. If he has, the power would have been invoked and exercised in a thousand cases, and would have been hedged around by usage and regulations, and would have been broadly known to the people and to the president, and he would not have been under the necessity of asking Mr. Pierrepont—is the executive a court? The free and easy way in which Craig took his case to the president and afterwards argued it before the attorney general, without giving notice to any one, also implies that there was no precedent to instruct or restrain him. We cannot find in the books another example of an appeal entertained by a president.

The government generally deems itself bound by the deliberate decisions of the heads of the departments, as we have already shown. Hence, if appeals to the president be allowed, citizens would alone appeal, and the mutuality would all be on one side. The entertainment of such appeals, too, would place the president in a strange position towards his cabinet and the judiciary. The infinity of cases coming up on appeal would compel hasty decisions. Now, the president's hasty reversal of a deliberate decision of a member of his cabinet, would not promote harmony in the cabinet. Nor, since the executive judgment or decree could not bind the judiciary, (Johnson *v.* Towsley, 13 Wall., 72, 84,) would the judicial reversal of them and the resulting vindication of the decision of the member of the cabinet, tend to restore that harmony, or to maintain the mutual respect which should exist between the judiciary and the president.

Moreover, promptness is at times essential in enforcing departmental decisions; but if appeals lie to the president the most vital machinery of the government may be stopped for years. The constitution recognizes "the Heads of Departments." (Art. II, sec. 2.) But if their deliberate decisions do not conclude the executive,—if the president may revise and reverse them, then he is the head of the departments and the secretaries are the tails of departments: they are the body and breeches, the president is the brains, and the constitution has no meaning.

If the head of a department should make an unfaithful decision, which is not to be presumed, it would become the president's duty to demand his resignation, or to have him prosecuted, or to advise his impeachment, and to suggest proper legal proceed-

ings on the part of the government, or of the injured party, to avert the effect of the decision. In case of such an unfaithful decision, its mere reversal on appeal to the president would not cure the unfaithfulness of the officer who rendered it, or discharge the constitutional duty of the president. But if, as in this case, the decision of the head of the department is faithfully, intelligently, and maturely rendered, and is only objected to for error of law, the constitution neither requires nor empowers the president to review it.

The opinions of former attorneys general confirm these views. Appeals have been taken to the president, occasionally, but they have always, save in this case, been discountenanced. (1 Opinions, 624 and 680, 636, 678, by Mr. Wirt; 2 *id.*, 481, 507, by Roger B. Taney; 4 *id.*, 341, by John Nelson; 4 *id.*, 515, by John Y. Mason; 5 *id.*, 275, 287, 630, by John J. Crittenden; 6 *id.*, 226, by Caleb Cushing; 10 *id.*, 526, 527, and 11 *id.*, 14, by Edward Bates; 13 *id.*, 28, by Ebenezer R. Hoar; 13 *id.*, 387, by A. T. Akerman; &c.)

They are also confirmed by decisions of the presidents. Mr. Buchanan refused to consider an appeal to him from a decision of the secretary of the treasury, saying "an appeal does not lie to the president from the decisions of the heads of the different Executive Departments." (1 Land Laws, Regulations, and Decisions, Lester, p. 681.) President Pierce seems to have held the same opinion. (*Id.*, 508.)

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." (Wilcox *v.* Jackson, 13 Peters, 498, 513.) Their acts are his. (*Id.;* Williams *v.* U. S., 1 Howard, 290.) And so, in law, Craig's proceeding was an appeal from the president to the president. Many cabinet discussions are held for the express purpose of directing the action of some head of a department. The president announces his views, and hears those of others, and the decision, when made by the head of the department, is practically that of the president. (1 Land Laws, Reg. and decis., Lester, p. 681; 7 Opinions, 453.) So that an appeal to the president is not necessary to guard his prerogative, or to insure thoroughness of discussion or accuracy of decision.

But it may be said that Mr. Delano had no jurisdiction, and hence the president could lawfully restrain or review his action. If Craig had proceeded throughout this case under a perfect grant, protected by the law of nations, it might possibly be true that Mr. Delano had no jurisdiction. But, the claims of Vigil and Saint Vrain are not perfect. They are inchoate. Craig invokes the act of 25 February, 1869, to maintain his title. His great object is to sustain, as absolute, the power of Stanton and

Cook, under that act, and to maintain the approved plat. But we have seen that the law empowers the commissioner to control the decisions of Stanton and Cook, and to control the approved plat; and that the secretary's "jurisdiction to revise on the appeal was necessarily coextensive with the powers to adjudge by the commissioner." (Magwire *v.* Tyler, 1 Black, 195, 202.) The whole case, therefore, was within the jurisdiction of the interior department, and the only evidence that it was not, is Craig's assertion to the contrary. If Mr. Delano had no jurisdiction, or if he had felt a doubt on the point, the remedy was, not an appeal to the president, who certainly has no jurisdiction, but a discussion and determination of the point in the cabinet, whose jurisdiction is undefined and hence unquestionable.

As there is no precedent, save this, for the entertainment of appeals by the president, so there is no law. It is true, the act of 4 July, 1836, s. 1, (5 stat., 107,) under which all of the appeals of the derivative claimants were taken to the commissioner, declares that he shall exercise his powers of supervision and control "under the direction of the president." Yet this does not mean the personal direction of the president. On the 4 July, 1836, attorney general Butler of New York, having been asked by presient Jackson his opinion of the act of that date, said that he thought the general land office still remained subject to the general superintendence of the president through the head of the treasury department. (3 Opinions, 137.) So, though the act of 31 January, 1823, s. 1, (3 stat., 723,) prohibited the advance of funds to the disbursing officers of the government, save "under the special direction of the President," his duty can only be performed through the agency of the appropriate department. (Williams *v.* U. S., 1 How., 290, 297.)

Besides, s. 1 of the act of 4 July, 1836, was repealed by R. S., § 441, "Second," and § 453, which placed the commissioner "under the direction of the secretary of the interior." The revised statutes came in force on the 22 June, 1874. Mr. Delano's second decision was made on the 23 January, 1875, and Craig took his case to the president afterwards. So his appeal was not taken under the act of 1836, and is governed by the revised statutes, which do not sanction it. Nor would it have been sanctioned by the act of 3 March, 1849, (9 stat., 395), whose 3d section first gave the secretary his appellate power over the commissioner. "It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." (By chief justice Waite, in Railroad Co. *v.* Grant, 98 U. S., 398, 401; Durusseau *v.* U. S., 6 Cr., 307, by chief justice Marshall; Railroad Co. *v.* Trook, 100 U. S., 112, 113.)

As the president had no jurisdiction in this case, his order, and the plat which issued on his order, were void. The plat was

and is void, too, because by s. 3 of the act of 25 February, 1869, the plat could not issue until the adjustment of the claims under that act, and there can be no adjustment so long as Leitensdorfer's appeals are pending before the commissioner. Section 3 of the act of 1869 bound the president. The pretence that the decisions of Stanton and Craig bound the executive "was without foundation. It may have misled the officers at Washington, and in this it may have answered its purpose. The officers of the government are the agents of the law. They cannot act beyond its provisions, nor make compromises not sanctioned by it." (Cunningham *v.* Ashley, 14 How., 377, 388.) "Where the officer had no authority to issue the grant," said chief justice Marshall, the "grant is absolutely void," and its validity is necessarily examinable "at law." (Polk's Lessee *v.* Wendell, 9 Cranch, 87, 99; Smelting Co. *v.* Kemp, 104 U. S., 636, 643–4, by justice Field.) "We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment." (Patterson *v.* Winn, 11 Wheat., 380, 384; approved, Rice *v.* Railroad Co., 1 Black, 358, 375; Parker *v.* Duff, Lewis' Leading Cases on Pub. Land Law, 320, 327, s. c., 47 California, 554.) "It has always been held, that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it." (Sherman *v.* Buick, 93 U. S., 209, 216, by Miller, J.) It makes no difference that the executive acted personally here. "The president of the United States has no right to issue patents for land, the sale of which is not authorized by law." (Easton *v.* Salisbury, 21 How., 426, 431; approved, Parker *v.* Duff, 47 Cal., 554.) Where the department has no jurisdiction to patent lands, "its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed." (Smelting Co. *v.* Kemp, 104 U. S., 636, 641, by justice Field.)

So that Craig's plat is null from the beginning for matter of law, irrespective of fraud in the decision of Stanton and Cook.

Any person who promises, offers, or causes to be offered, anything of value to any U. S. officer, or tenders any contract for the conveyance of anything of value to such officer, with intent to influence his decision or action on any matter which may at any time be pending before him in his official capacity, is punishable by fine and imprisonment; (R. S., § 5451;) and the officer who asks or accepts the promise, offer, or tender, with intent to have his decision or action influenced thereby, is punishable in like manner, (*ib.*, § 5501,) and, after conviction, is "forever disqualified from holding any office of honor, trust, or profit under

the United States." (*Id.*, § 5502.) A register or receiver is also removable from office, on satisfactory proof that he "has charged or received fees or other rewards not authorized by law." (*Id.*, § 2242.) Were these provisions violated here? The supplemental bill so charges, (Transc., 49,) and Craig's answer denies the charge. (*Id.*, 68–'9.) What are the facts?

On the 21 February, 1873, (Transc., 184,) the bureau wrote Stanton and Cook that the time for the filing of the derivative claims, would, by law, end on the 24 February, 1873. Assuming the latter date as the beginning of their duties in deciding those claims, it appears that,

FIRST. On the 12 September, 1873, William Craig conveyed to Philip Golding and Jonathan Watson, with warranty, for an alleged cash consideration of $15,000, sections 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, in T. 24 S., R. 64 W., being 16 sections, or 10,240 acres, in the Vigil and Saint Vrain grant, in Pueblo co., Colorado, on both sides of the Huerfano river. The deed was acknowledged on the 29 October, 1873, and recorded on the 30 October, 1873. (Transc , 164 *et seq.*) This land is in Craig's derivative claim. (See his *approved plat*, Trans., 234.)

SECOND. By a deed *dated the fourth* September, 1873, Philip Golding conveyed to "David H. Moffat, Jr., trustee," with warranty, for an alleged cash consideration of $10,000, an undivided ¼ of the lands conveyed as above, on the *twelfth* September, 1873, by Craig to Golding and Watson, that is to say, a ¼ of 10,240 acres, equal to 2,560 acres. The deed by Golding was perhaps made after the deed from Craig to him and Watson, as it was not acknowledged till the 4 April, 1877, nor recorded till the 6 April, 1877. (Transc., 104.) At the time of these two deeds, and down to about May, 1878, Golding was insolvent. This appears from the testimony of Daniel W. Mays, (Transc., 92,) and of David H. Moffatt, Jr., (*id.*, 95,) and by executions against him, returned *nulla bona*. (*Id.*, 117–135.) Moffat said: "I reside in Denver, Colorado, and am cashier of the First National Bank of Denver." (*Id.*, 94.) About the deed dated 4 September, 1873, from Golding, to him as trustee, (marked Exhibit "E" in the Transc., p. 104,) he said: The title is vested "In me, as trustee, to secure these advances to Charles A. Cook." (*Id.*, 95.) "My remembrance of that thing is that Golding, Charlie Cook, and one Watson bought the land from William Craig, and Watson paid down five thousand dollars. I made no advances on that purchase. I was not consulted when the deed to me was made. The Charlie Cook I refer to was Charles A Cook, receiver of the land office at Pueblo at that time. I don't know why they put me in as trustee. I suppose it was to accommodate themselves. I did not ask them. I knew that the amount was paid by Watson, as stated by

me. Watson's son drew a draft on his father, and Phil. Golding presented it, as I remember, and we cashed it. Cook at that time was owing the bank, and a part of the proceeds of this draft may have gone to his credit against his indebtedness. I made no payment for this conveyance to me. I don't remember whether I have conveyed the land or not. I have no claims on the land myself," &c. (Transc., 94.)

After the two deeds of the 12th and 4th of September, 1873, that is to say, on the 23d of February, 1874, Stanton and Cook signed their decisions in the cases of Craig and Leitensdorfer. (Transc., 228, 328.)

THIRD. After that, on the 10 March, 1874, William Craig conveyed to Philip Golding, with warranty, for an alleged cash consideration of $20,000, an undivided ¼ of certain sections, &c., in his derivative claim, omitting the tracts conveyed, as above, on the 12 and 4 September, 1873, and some other small tracts in the claim. (Transc., 160.) The tracts described in this deed of 10 March, 1874, amount to 58,043.21 acres, of which ¼ would be 14,510.80 acres. The deed was acknowledged 11 March, 1874; and was recorded 14 March, 1878, (*Id.*, 162,) after this suit was instituted.

FOURTH. The day after the acknowledgment of that deed, that is, on the 12 March, 1874, Philip Golding conveyed to David H. Moffatt, Jr., trustee, with warranty, for an alleged cash consideration of $25,000, an undivided ¼ of certain sections, &c., in Craig's derivative claim, the sections, &c., amounting to 39,643.21 acres, of which the ¼ would be 9,910.80 acres. (Transc, 101.) This deed was acknowledged 4 April, 1877, and recorded 6 April, 1877. (*Id.*, 103.) The sections, &c., described in the deed, constitute the chief part of those described in the deed 3*d* above. of 10 March, 1874, from Craig to Golding. Of this deed of 12 March, 1874, David H. Moffatt, Jr., said:—"I paid no consideration at all. * * * I was consulted by Golding and Cook together. They proposed to deed their lands to me as trustee, provided I would make certain advances to Cook—that is, that the bank would make the advances. The bank did advance money on it from time to time. The account would sometimes run down to $5,000, and then would run up to $10,000." (Transc., 95.)

FIFTH. On the 20 March, 1877, attorney general Devens rendered his opinion that the action of president Grant, in awarding the approved plat to Craig, &c., bound the Hayes administration, (15 Opinions, 208.) So, on the 4 April, 1877, Philip Golding conveyed to David H. Moffatt, Jr., trustee, with warranty, for an alleged cash consideration of $5,000, an undivided ¼ of these lands:—secs. 35, 36, T. 23 S,, R. 63 W.; secs. 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 36, T. 24 S., R. 63 W.; secs. 1, 12, 13, 14, 15, 16, T. 25 S., R. 63, W., in Craig's derivative claim, the sections amounting to 12,160

acres, of which the ¼ would be 3,040 acres. (Transc., 105.) The deed was acknowledged the same day, and recorded 6 April, 1877. (*Id.*, 106–'7.) These sections are part of those described in deed 3*d* above, by which Craig had, on 10 March, 1874, conveyed to Golding an undivided ¼ of them and of other sections, &c., in Craig's derivative claim. Respecting this deed of 4 April, 1877, David H. Moffatt, Jr., said, (Transc., 95:)—"I was consulted by Golding and Cook both. I agreed to hold it in trust for them, Cook's interest being held in trust to secure his indebtedness, and it is yet so held by me to secure his indebtedness to the First National Bank, which I estimate at about ten thousand dollars, though I will not pretend to be precisely accurate from memory, but that approximates the amount. I paid no consideration for this conveyance, it being given as additional security for Cook's indebtedness, so far as his interest was concerned. I am the executor of Charles A. Cook's estate," &c. * * * "He was receiver of the land office at Pueblo at the time, and has since died."

SIXTH. On the 12 November, 1878, after this suit had been instituted and Craig's plat and patent delivered, David H. Moffatt, Jr., conveyed, by quit claim deed, to Irving W. Stanton, of Pueblo co., Colorado, for an alleged cash consideration of $7,000, all of the vendor's interest in certain lands in that county. The deed was acknowledged on the same day, and was recorded on the 6 January, 1879. (Transc., 155–157.) It conveyed an undivided ½ of so much of ss. 21, 22, T. 23 S., R. 63 W., as lies on the N. W. side of Huerfano river,—the parts described containing about 750 acres. It also conveyed the undivided ¼ interest in other lands, as conveyed in trust to David H. Moffatt, Jr., by Golding's deeds of 4 September, 1873, (see no. 2d above,) 12 March, 1874, (see no. 4th above,) and 4 April, 1877, (see no. 6th above.) The interest conveyed by the deed was equal to about 15,885 acres; and all the sections, &c., described in the deed, are in Craig's derivative claim. About this deed Moffatt testified thus, (Transc., 115,)—"This deed is a copy of a deed that I executed to I. W. Stanton, and embraces a part of the lands originally conveyed by Craig to Phil. Golding and by Golding to me." Being asked on what terms he conveyed to Stanton, he said:—"I conveyed it to him to organize a company, and agreed to take my pay in first-mortgage bonds of that company, and this is the land conveyed to me for the benefit of Cook, as described in the deeds mentioned in my former deposition taken in this case." Moffatt also swore that the land conveyed by this deed of 12 November, 1878, was part of the land held in trust by him "for Cook the receiver;" that he knew not what interest Stanton had in it; that Stanton called on him to get the conveyance to Cook's estate; and that witness did not pay Golden any consideration

for the lands conveyed to witness. "But," said he, "I loaned Cook money on them, and the conveyance was made to secure money loaned to Chas. A. Cook." (Transc , 116.)

SEVENTH. On the 21 November, 1878, Jonathan Watson and wife, by their attorney in fact, M. A. Wray, conveyed to Irving W. Stanton, with warranty, for an alleged consideration of $3,000, cash, an undivided ¼ of ss. 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 27, 28, 33, 34, 35, 36, T. 24 S., R. 64 W., being 16 sections, or 10,240 acres, in Craig's derivative claim. (Transc., 157.) The deed was acknowledged on the same day, and recorded 6 January, 1879. (*Id.*, 159.) The interest conveyed equals 2,560 acres. The whole of the sections named in this deed, had been conveyed on the 12 September, 1873, by Craig to Golding and Watson, (see deed 1*st* above,) and, on the 4th of September, 1873, Golding had conveyed to Moffatt, trustee, an undivided ¼ of the same sections, equal also to 2,560 acres. (See deed 2*nd* above.

It thus appears, that, before the decisions of Stanton and Cook of 23 February, 1874, in the claims of Craig and Leitensdorfer, (Transc., 228, 328,) Craig, on the 12 September, 1873, had conveyed to Golding and Watson, (see deed *First*, above,) 16 sections, or 10,240 acres; of which Golding, on the 4 September, 1873, had conveyed to Moffatt, for receiver Cook, (see deed *Second*, above,) an undivided ¼, or 2,560 acres, and Watson, on the 21 November, 1878, conveyed to register Stanton, (see deed *Seventh*, above,) another undivided ¼, or 2,560 acres. What Golding and Watson did with the undivided ½ remaining to them, the record does not explain. They perhaps retained those as pay for their services and risks.

Stanton and Cook's "security for the future," was the deed of 12 September, 1873, (before their decision,) to the extent of ½ of 10,240 acres, being . . . . . 5,120.00 acres.

*After* their decision for Craig, they got their "indemnity for the past," thus:—

| | | |
|---|---|---|
| By Golding's deed to Moffatt of 12 March, 1874, (see deed *Fourth*, above,) ¼ of 39,643.21 acres, equal to . . . . . | 9,910.80 | " |
| By Golding's deed to Moffatt of 4 April, 1877, (see deed *Fifth*, above,) ¼ of 1,260 acres, equal to . . . . . | 3,040.00 | " |
| Acres in Craig's claim traced to Stanton and Cook . . . . . | 18,070.00 | " |
| The ¼ of Craig's claim of 73,251.55 acres is . | 18,312.89 | " |

This suit was instituted 4 May, 1877. After Moffatt's deed to Stanton of 12 November, 1878, (see deed *Sixth*, above,) and Watson's

deed to Stanton of 21 November, 1878, (see deed *Seventh*, above,) that is to say, on the 17th December, 1878, Stanton made a quit claim deed of the lands thereby conveyed, and of other lands, all in Pueblo co., Colorado, for "one dollar and other valuable considerations," to "the Colorado Cattle Company, a joint stock corporation organized under the laws of the State of Connecticut, and located at Bridgeport, in said State;" (Transc., 445;) and on the next day, William Craig also made a quit claim, to the same company, of his interest in 71,638 acres, "being the main body of lands contained in the patent and plat granted to said William Craig by the United States," &c., or, in other words, being the main body of his derivative claim. (Transc., 457.)

The mere "promise" of a conveyance, made and accepted with intent to influence the decision of Stanton and Cook, would have supported an indictment for bribery under the statute; (R. S., § 5451, 5501;) and it cannot have less weight in equity. It is not to be supposed that Stanton and Cook would decide for Craig before securing part of their consideration, nor that Craig would pay the whole consideration before securing the decision. Nor is it to be supposed that the consideration would have been paid without the ordinary devices of circuity, and intermediaries. The casuistry displayed by Stanton and Cook in their efforts to sustain Craig's claim, (Transc., 223,) and defeat Leitensdorfer's, (*id.*, 324,) consists with the theory of an improper influence by Craig. The court below seems to have had just ground for decreeing, as it did, that the decision for Craig "is fraudulent and void." (*Id.*, 471.) The record shows the existence of a corrupt ring in the Pueblo land district, Colorado, during the pendency of these claims, and shows that Stanton and Cook were links in the ring. See the commissioner's reports of 27 January, and 26 February, 1874, to the Secretary, about the Pueblo Office. (Transc., 187, 189; and see *id.*, 99, Exhibits "A" and "B".)

The germ of the Colorado Cattle Company is thus traced to the deeds or agreements of 12 and 4 September, 1873, between Craig on the one side and Stanton and Cook on the other, with Golding, Watson and Moffatt interposed. This germ grew into the approved plat and patent sought to be canceled here by Leitensdorfer. The consummate plant, well watered, in the $350,000 seven *per cent.* coupon bonds of that company, appears in the deed of trust of 18 December, 1878, by the company to Jas. B. Johnston of New York city and A. F. Freeman, of Boston, trustees, (Transc., 460,) embracing all of Craig's derivative claim, with some other lands, and amounting, altogether to 81,003.61 acres. On the same day, Craig, as we have seen, had conveyed the main body of his claim to this company, and on the day before, Stanton had conveyed to the company his interest in the claim as derived by him from Moffatt and Watson.

If Craig's plat be void for the preceding reasons, much more is his patent so. The patent had not even the sanction of the president's order. It issued under R. S., § 2447, which only authorizes patents for confirmed claims. Now, Vigil and Saint Vrain had each a hypothetical claim as confirmed by the act of 21 June, 1860; but that act and the act of 25 February, 1869, treat the derivative claimants, not as confirmees, but as settlers, under the authority of the confirmees. The same distinction appears in sec. 5 of the latter act, which contemplates suits against the U. S. by the confirmees, but none by the derivative claimants.

Moreover, R. S., § 2447, only authorizes patents in case "no provision is made by the confirmatory statute for the issue of a patent;" but here, sec. 3 of the act of 1869 had already provided for approved plats as "evidence of title," plainly treating those plats as divesting the fee and therefore as equal to patents.

On the various grounds thus set forth, we submit, that, as stated in our proposition VII, *The president had no power to review the final, deliberate decision of the* secretary *sustaining the commissioner's appellate jurisdiction, and no power to award the title to Craig, and that title was void.*

VIII. If the president had a right to interfere, his action may be reviewed by the judiciary for errors of law.

"Where the officer had no authority to issue the grant" it is absolutely void, and its validity is necessarily examinable at law. (Polk's lessee *v.* Wendell, 9 Cr., 37, 99, by Marshall, Ch. J.) "There are some things so essential to the validity of the contract, that the great principles of justice and law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired, might be examined." (*Id.*,) quoted and approved; (Smelting Co. *v.* Kemp, 104 U. S., 636, 643, by justice Field; and see Marbury *v.* Madison, 1 Cr., 137, 163, 166, by chief justice Marshall. Our VIII. point is also sustained by State of Minnesota *v.* Batchelder, 1 Wall., 109, 115.) "Equity has always had jurisdiction of fraud, misrepresentation, and concealment; and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against the parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity." (Jones *v.* Bolles, 9 Wall., 364, 369, by justice Bradley.)

If the officers of the land department "err in the construction of the law applicable to any case, or if fraud is practised upon

them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions." (Shepley *v.* Cowan, 91 U. S., 330, 340, by justice Field; quoted and approved, Moore *v.* Robbins, 96 U. S., 530, 536, by justice Miller.) After a land patent issues, "If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." (Moore *v.* Robbins, 96 U. S., 530, 533.)

The act of 12 June, 1858, s. 10, (11 stat., 319, 326,) in conflicting pre-emptions, amended the act of 4 September, 1841; s. 11, (5 stat., 455,) by transferring from the secretary of the treasury to the commissioner of the general land office the power to review the decisions of the register and receiver, declaring that the commissioner's decision "shall be final, unless appeal therefrom be taken to the Secretary of the Interior." Yet Johnson *v.* Towsley, (13 Wall., 72, 83, 84,) said that these words do not preclude a judicial review of the commissioner's decision; for "there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle." Johnson *v.* Towsley, 13 Wall., 72, 84, by justice Miller.)

So the act of 3 March, 1877, s. 5, (19 stat., 377,) provided, with respect to the Hot Springs reservation in Arkansas, that the board of 3 commissioners, created by the act, shall "finally determine the right of each claimant or occupant to purchase the" land or part of it. But, said a majority of this court in Rector *v.* Gibbon (111 U. S., 276, 288, by justice Field), this clause does not withdraw the board's "decisions from the correcting power of the court when the board has misconstrued the statute, and thus defeated its manifest purpose," &c.

But Craig, in his answer (Transc., 67), says that neither the executive or the judiciary can review the decisions of Stanton and Cook, because Leitensdorfer acquiesced in justice Humephrey's decision, denying Leitensdorfer a mandamus on the commissioner to compel the trial of the appeals of the derivative claimants pending in the bureau. Now, the petition for the

mandamus was not optional with Leitensdorfer. Judge Hallett, on 21 May, 1877, (Transc., 25,) ordered the institution of the mandamus on pain of the dissolution of the injunction granted by him on that day. On the 19 June, 1877, Leitensdorfer's counsel, with great reluctance, filed the petition for the mandamus in the supreme court of the district of Columbia, (affidavit of Robt. H. Bradford, (Transc., 30,) moving for a rule on the commissioner to show cause why the mandamus should not issue. But, on the 3 July, 1877, justice Humphreys dismissed the motion on the grounds, among others, that no appeal lay to the commissioner, and that the mandamus was premature. (Supplemental bill, Transc., 46–7.) But justice Miller's dissolution of the injunction on the 13 July, 1877, (Transc., 31,) dissolved the condition on which it had issued, *i. e.*, the condition that Leitensdorfer should institute the mandamus. The injunction was dissolved on the ground that it was not competent for the judiciary to interfere till the executive had exhausted its powers by issuing the final title to Craig. (Recited, Leitensdorfer *v.* Campbell and Craig, 5 Dillon C. C. Repts., 419.) After the dissolution, the commissioner delivered the plat to Craig. (Answer, Transc., 68.) If there was justice in the grounds for the dissolution, there was no justice in requiring the mandamus to be filed before the plat issued, and would be as little justice in requiring Leitensdorfer to do so vain a thing as to seek a review, by this court, of the mandamus proceedings; for it is to be presumed that the court would dismiss the writ of error on the ground on which justice Miller dissolved the injunction. Besides, the merits of the mandamus were not reached before justice Humphreys. There was no traverse of the petition for the mandamus, and of course no traverse of the return to the alterative writ because no such writ issued. Indeed, justice Humphreys would not grant the rule on the commissioner to show cause. The commissioner, therefore, never appeared in the case, and there was no trial on the merits and no record on which this court could have tried the merits had the case been brought here by writ of error. In fact, mandamus will not be granted "where the proper remedy is in equity," (3 Term Reports, 646; 16 M. and W., 451,) or "when there is other adequate remedy." (11 Ad. and E, 69; 1 Q. B., 288; Redf. Railw., § 159 and cases cited in notes.) If this court, in the present case, cancels Craig's title, the executive will respect the decree, and the appeals now pending before the commissioner will be tried, or, in case he should refuse to try them, which is not to be presumed, mandamus will *then* lie to enforce a trial. This case is peculiarly one of equitable cognizance. It was impossible to reach its merits at law. Under Leitensdorfer's supplemental bill, this court can try all the questions involved in the mandamus, and many which could never have been tried

in the mandamus proceedings, and can give ample relief. The case should therefore proceed. If Craig considered the dismissal of the mandamus as a bar to the further prosecution of this suit, he should have offered below a transcript of the proceedings in the mandamus; but he did not do so.

We conclude, therefore, as suggested under proposition VIII, above, that *If the president had a right to interfere, his action may be reviewed by the judiciary for errors of law.* Our final proposition is,—

IX. CRAIG'S VENDEES ARE BUYERS *pendente lite*, AND WILL BE BOUND BY AN AFFIRMANCE OF THE DECREE BELOW AGAINST HIM; AND ON THE WHOLE CASE, THAT DECREE SHOULD BE AFFIRMED.

Where the U. S. patents agricultural lands in enormous bodies, to or for a railroad company, to enable the company to sell the mass of the lands and thereby raise funds for building the road, and the government then files a bill to annul the patents for illegality, it is justly held by Judge Sawyer that the bill will be dismissed unless all those holding the lands under sales made by the company after patent, be made parties; for the vendees were induced to purchase by the patents. (U. S. *v.* Central Pacific R.R. co., 9 Copp's Land Owner, 44; same *v.* same, 12 *id.*, 317.) But this doctrine does not apply here, because all who bought land from Craig after his plat issued, were buyers after the institution of this suit, and bought at their peril. Moreover, Leitensdorfer, after instituting suit, published the *lis pendens*, usual under local law, warning the public against buying Craig's claim. Proof of this will be made when it becomes proper, in some future proceeding, to make it.

So much for Craig's conveyances after suit.

The conveyances by Craig, before suit, were:—Sale to Golding and Watson, of 12 Sep., 1873; (Transc., 164;) sale to Golding, of 10 Mar., 1874; (Transc., 160;) mortgage to Olinus Smith, of 15 Mar., 1877, and sale to Benjamin F. Butler of 20 Ap., 1877, recorded, in Pueblo Co., Colorado, on 15 June, 1877.

Of the mortgage to Smith and sale to Butler, it might suffice to say that this court cannot consider them, in this suit, because they are not in the transcript: they only appear on p. 79 and 82, of "Evidence in behalf of Appellant in support of motion for rule to show cause," filed in this case by Craig's counsel. They should have been offered below, and then Leitensdorfer might, if necessary, have made Smith and Butler defendants, or they might have made themselves parties. But, if the mortgage to Smith and sale to Butler are rightly before this court, they cannot arrest the progress of this cause. The mortgage was for $2,000, at ten *per cent.*, payable on or before 15 June, 1877; but

Craig, in his subsequent sale to Butler of 20 April, 1877, covenanted that the same lands, being his derivative claim, "are free from all incumbrance." This means that Smith had been paid, and that, by the 20 April, 1877, the whole title of Craig had again vested in himself. As for the sale to Butler, this suit was filed on the 4 May, 1877, (Transc., 1,) and the sale was not of record till the 15 June, 1877. The sale recites that it was made before the commissioner approved or delivered Craig's plat. So that this suit is not affected by the mortgage or sale. They both refer to the act of 25 February, 1869, and to the decisions of Cook and Stanton for Craig; and the sale to Butler recites that Craig's evidence of title was at the time pending for examination before the commissioner.

Mr. Butler was retained as counsel by Craig on behalf of Craig's derivative claim "early in the year 1875." (P. 2 of "Evidence in behalf of Appellant in support of motion for rule to show cause.") "After this suit was commenced," says Mr. Butler, (*id.*, p. 4,) "I was not of counsel in it for Col. Craig or for the Cattle Company, until after the first appeal was entered in this court; although, when called upon for information in regard to the suit, I furnished such as I had." According to Mr. Butler's statements he was counsel for Craig before the executive, and afterwards bought Craig's claim. He is now also of counsel for Craig before this court. Such being the case, he can derive no advantage or immunity from his alleged temporary withdrawal as counsel, but is chargeable with notice of all the intermediate proceedings. In U. S. *v.* Curry, 6 Howard, 106, chief justice Taney said:—"So far from permitting an attorney to embarrass and impede the administration of justice, by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke." (*Id.*, 112.)

The public act of 21 June, 1860, is referred to by s. 1 of the public act of 25 February, 1869. All persons are bound to know those acts and the public acts enabling the commissioner and secretary to review the decisions of Stanton and Cook. A law consists in its proper construction, what is implied in the law, being part of the law. As Mr. Smith's mortgage and Mr. Butler's deed refer to the decision of Stanton and Cook for Craig, and to the act of 1869, they are chargeable with knowledge of the truth that Craig could have no title until his claim had been adjusted by the commissioner and secretary according to law. They therefore negotiated with Craig at their peril. "No principle is better established, than that a purchaser must look to every part of the title which is essential to its validity." (Brush *v.* Ware, 15 Pet., 93, 111.) "The question is not whether the defendant in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close

his eyes to facts; facts which were open to his investigation, by the exercise of that diligence which the law imposes. Such purchasers are not protected." (*Id.*)

Moreover, all of the conveyances by Craig were made after he filed his claim before Stanton and Cook, and while it was pending. In fact, as we have shown elsewhere, the claim, in law, is still pending before the commissioner. We have also shown, by decisions of the bureau and department, that the rule *pendente lite nihil innovandum*, is as strictly and reasonably enforced by the executive as by the judiciary. Leitensdorfer's appeal is as lawfully, as absolutely and as efficiently pending before the executive as Craig's appeal is now pending before the judiciary. Therefore, all the buyers from Craig are buyers *pendente lite*, and will be bound by the decree of this court.

The other deeds by Craig before the filing of this suit, will now be considered.

On the 12 September, 1873, he conveyed to Philip Golding and Jonathan Watson 10,240 acres of his derivative claim; (Transc., 164;) but we have shown, under point VII of this brief, that these vendees afterwards conveyed each one ¼ of the same land to David H. Moffatt, junior, trustee, for the purpose of corrupting Stanton and Cook in the interest of Craig, and that the land was applied accordingly. Mr. Moffatt has acted as intermediary in similar questionable transactions respecting lands in the Pueblo land district, Colorado. (Moffatt *v.* U. S., 112 U. S., 24, 27.)

On the 10 March, 1874, Craig also conveyed to Philip Golding an undivided 14,510.80 acres ofthe derivative claim; (Transc., 160;) but the deed was not recorded till the 14 March, 1878, long after this suit was filed, and therefore need not be further considered here; we have commented on it elsewhere. Now, equity will not interfere on behalf of Golding and Watson, to avert a decree canceling Craig's title. They have no interest. The whole derivative claim of Craig belongs to the Colorado Cattle Company (Transc., 462,) under sales made *pendente lite*. Golding and Watson knew they were buying lands claimed by Craig in the Vigil and Saint Vrain grant, for Craig's deed to then recited the fact. (Transc., 164.) Craig was the beneficiary named in the plat and patent to him, and received personal delivery, *pendente lite*, of those titles from the bureau here, which does not recognize any other owner or claimant. It was right, therefore, that he alone should be sued. Besides, they who seek equity must do equity. Golding and Watson were tenants in common of land used by Craig, thro' them and Moffatt as intermediaries, for the purpose of corrupting Stanton and Cook; and, the corrupt scheme was successful. No rights on behalf of Golding and Watson can arise out of such a transaction. *Ex dolo malo non oritur actio*, Equity will not protect men who have no equities.

There are many other flaws in Craig's title, which will be fully presented to the executive when the appeal of Leitensdorfer shall be considered by the commissioner. But one of those flaws will be noticed here. The first link in Craig's title is a deed of the 15 April, 1859, from Reyes Baca, as Cornelio Vigil's widow. (Transc., 195.) But the widow had no title. "Property acquired by either after marriage by a gratiutous title, such as inheritance, donations, or bequest, does not belong to the community." (Civil Law of Spain and Mexico, art. 46; Fuero Real, *l.* 1 and 2, *T.* 3, *B.* 3; Nov. Recop., *l.* 5, *T.* 4, *B.* 10.) The inchoate grant to Vigil and Saint Vrain was a gratuity. We find no proof in the record that Vigil ever spent any time, work or money in improving it.

The prayer of the supplemental bill (Transc., 50,) asked the court below to order the surrender of Craig's titles into court, and to cancel them. This prayer the court, in its final decree, (*id.*, 471,) overlooked. We therefore ask, in the event of the affirmance of that decree, that this court may remand the cause with instructions to the circuit court to actually cancel Craig's plats and patents, *ut ne lis ex lite oritur*. A convenient precedent for such relief will be found in the somewhat similar case of U. S. *v.* Hughes, 11 Howard, 552, 569. No brief having yet been filed by Craig, this brief may perhaps be found to contain points not discussed at all in his brief.

Since finishing this brief, we have learned that Thomas Leitensdorfer died, intestate, on the 24 March, 1886. On the 2 October, 1886, letters of administration were granted to Edward J. Hubbard by the judge of the county court of Las Animas county, Colorado. On the same day, the administrator executed a power of attorney to the undersigned to appear for him in this case. We will file the letters and the power and enter our appearance accordingly.

We submit that, on the whole case, the decree below against Craig should be affirmed.

ROBT. H. BRADFORD,
CHARLES W. HORNOR,
For THOMAS J. ALLEN,
And for EDWARD J. HUBBARD,
*the Admr. of Thomas Leitensdorfer.*

WASHINGTON, D. C., 9 *October*, 1886.

25-189

# Supreme Court of the United States;

OCTOBER TERM, 1886.

WILLIAM CRAIG'S Executor, *Appellant*,
*vs.*
THOMAS LEITENSDORFER'S Adm'r, *Appellee*,
} No. 2.

*Appeal from the Circuit Court of the United States for the 8th Circuit, and District of Colorado.*

***Supplemental Brief for Appellee, in Reply to Appellant's Brief filed 5 October, 1886.***

ROBERT H. BRADFORD,
CHARLES W. HORNOR,
*Counsel.*

**See Table of Contents--(over.)**

## TABLE OF CONTENTS.


Page.

Reply to appellant's *Statement of Case*, . . . . . 1

Reply to appellant's I. point—non-joinder of appellee's trustee, . 2

Reply to appellant's II. point—appellee has but undivided interest in residuum, . . . . . 4

Reply to appellant's III. point—appellee did not file, with surveyor general, statutory notice of location, . . . . 5

Reply to appellant's IV. point—appellee's claim is not in *grant*, 6

Reply to appellant's V. point—appellee's interest had ceased before suit, . . . . . 19

Reply to appellant's VI. point—appellee shows no error in decision of Stanton & Cook against him, . . . . . 30

Reply to appellant's VII. point—evidence before Stanton & Cook justifies their decision against appellee, . . . . . 31

Reply to appellant's VIII. point—decision of Stanton & Cook is final in law—and they are innocent of fraud, . . . . 31

Reply to appellant's IX. point—bill should have been filed in name of U. S., . . . . . 42

Reply to appellant's X. point—decree below erroneous; it cancels Craig's title for more than 8000 acres, the maximum of appellee's claim, . . . . . 43

Reply to appellant's XI. point—decree erroneous: it cancels all Craig's title, though he held much of his land by deeds from appellee's vendors, antedating appellee's title, . . . . 44

Reply to appellant's XII. point—decree erroneous: it cancels all Craig's title, though the appellee's claim had been reduced to about *minus* 640 acres, . . . . . 44

Reply to appellant's XIII. point—decree erroneous: it cancels a U. S. patent issued after issue joined and not mentioned in pleadings; &c., . . . . . 45

Reply to appellant's XIV. point—decree should have been limited to land Craig owned when it was passed, . . . . 47


APPENDIX.


No. 1. Act 4 July, 1836, to reorganize general land office, . 48

No. 2. Act 3 March, 1849, to organize interior department, . 48

No. 3. Act 21 June, 1860, confirming Vigil & Saint Vrain claim; &c., . . . . . 49

No. 4. Act 25 Feb., 1869; proof and location of derivative claims; &c., . . . . . 50

No. 5. Joint Res. 28 Ap., 1870: extends time to prove claims, &c., 52

No. 6. R. S. § 441, 453, 2478: supervisory powers of commissioner and secretary, . . . . . 52

IN THE

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*Appeal from the Circuit Court of the United States for the 8th Circuit, and District of Colorado.*

## *Supplemental Brief for Appellee.*

On the 5th of October, 1886, a brief of 62 pages was filed in this case for appellant, but we had not seen it when, on the 9th of that month, we filed our first brief for appellee. There are points and authorities, therefore, in appellant's brief, not anticipated or discussed in our own. It is to answer those points and authorities that we now file this supplemental brief.

### REPLY TO APPELLANT'S STATEMENT OF THE CASE.

Appellant's brief, on p. 12, says "Craig paid his amount of the fees before he got his plat (Bill, p. 41)," &c. Leitensdorfer's bill, p. 41, does not allege this. The bill, p. 48, alleges that Craig paid "under protest." The derivative claimants, if actual settlers, were anomalous homesteaders, not confirmees, and were not required by law to pay any costs of survey. (Act 25 February, 1869, s. 2, 15 stat., 275, being No. 4 in appendix to this brief.) On the same page of appellant's brief, he says the bill "admits that he has a right to land where he settled and claims to have, and that is many miles distant from the settlement made by complainant. (See Bill, p. 44.)"

"Craig's title, therefore, is not in issue," &c.

The bill makes no such admission, It charges, p. 44, "that complainant's claim is not in conflict on the ground with Craig's claim, but is many miles distant," &c. It does not admit that Craig has a right to any land. It asserts that his title is fraudulent and illegal. (Transc., 49.) The object of the supplemental bill is to obtain the cancellation of Craig's title as a cloud on Leitensdorfer's title.

## Reply to Appellant's First Point.

The 1st point in appellant's brief, p. 18, is this:

"The suit cannot be maintained because Leitensdorfer, only claiming to be entitled to a resulting trust, has brought the suit in his own name alone, not having made his trustee either a co-plaintiff or a defendant in the suit."

But Thomas Leitensdorfer only asks the cancellation of Craig's title in order that Leitensdorfer's appeal before the commissioner may be tried; and he is entitled to the trial of that appeal without respect to its merits, just as Craig is entitled to the trial of his appeal before this court, without respect to the merits of his title. As the cases of Leitensdorfer and Craig must, if Craig's title be canceled here, proceed before the bureau and department, in their names or the names of their personal representatives, without the substitution of persons claiming a legal or equitable title to the derivative claims involved in this suit, (Mrs. King's case, Decis. of Dept. of Int. relating to Pub. Lands, II, 378, *380*; III, 110, *111*,) it is reasonable that those derivative claimants, or their personal representatives, should be the sole parties in this subsidiary proceeding before the judiciary.

Under the act of 3 March, 1851, (9 stat., 631,) to settle private land claims in California, it is provided, in s. 11, that the commissioners and the U. S. district and supreme courts shall be governed by "the principles of equity," among other rules of decision. In John A. Sutter's claim, where the commissioners confirmed his title and their decree was affirmed by the district court, the government appealed to this court, (U. S. *v.* Sutter, 21 Howard, 170,) contending that the claim should have been instituted by Sutter's grantees, as the record showed that he had conveyed nearly all his estate in the grants presented by him. (*Id.*, 182.) But the court thought otherwise; saying, (*id.*,) "the contrary practice was sanctioned in Percheman's case, (7 Pet.) and has been followed since. It is competent to persons interested in the claim to employ the name of the original claimant. (United States *v.* Percheman, 7 Peters, 51, [97;] United States *v.* Patterson, 15 How., 10.)"

So, in Castro *v.* Hendricks, (23 Howard, 438, *442*,) this court, construing s. 9 of the California act of 1851, said:—"The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court have repeatedly declared that the Government had no interest in the contests between persons claiming ex post facto the grant. United States *v.* Sutter, 21 How., S. C. R., 170."

The rule in Dan. Ch. Pr., 192, (and see Adams' Equity, p. 317, Am. ed. of 1855,) on which appellant founds his 1st point, relates to cases where the *cestui que trust* claims and sues for *property;* but here Leitensdorfer does not ask a decree for Craig's land or for any land.

The estate of Mrs. Farnsworth, (now dead,) Thomas Leitensdorfer's sister and trustee, would, in any case, have been bound by this court's decree; for she was a witness for her *cestui que trust* and hence was cognizant of the fact that he was suing for all having any interest in his derivitive claim. (Her testimony, Transc., 425.) She proved that she held Darby's interest, $\frac{2}{16}$, in Thomas Leitensdorfer's derivative claim, in her own right. (Transc., 426.) On 1 July, 1873, complainant, after filing his claim, conveyed his whole interest in it to John Hallum—half for Hallum and half for Hallum in trust for himself. (Transc., 84.) On the 5 May, 1874, Hallum conveyed to Mrs. Farnsworth, in trust for complainant, (*id.*,) the undivided $\frac{1}{2}$ which Hallum had held in trust for him. (Transc., 172.) This suit was filed 4 May, 1877. (*Id.*, 1.) On the 18 December, 1880, after decree for complainant below, he made an absolute conveyance to his sister, Mrs. Farnsworth, of all his interest in this grant, in consideration of money loaned, and of the care and education of his children. (P. 71 of "Evidence in behalf of Appellant in support of motion for rule to show cause.") After this court, on the 16 January, 1882, dismissed Craig's first appeal, Mrs. Farnsworth, on the 10 April, 1882, for $20,000 cash, made to our client, Thomas J. Allen, a deed for all the land in this derivative claim; (p. 11 of our "Answer to Motion of Appellant," filed here 31 October, 1885;) and she swore that the lands so conveyed were the same involved in this suit in this court. (*Id.*, p. 22.) Her trust for Thomas Leitensdorfer is extinct, for he, too, sold all his interest to Allen on the 10 April, 1882. (*Id.*, 13.) The whole title of the trustee and of the *cestui que trust* is hence in Allen, who has *appeared* in this suit. It is impossible, therefore, to hold that the trustee's heirs or representatives could, after the decree of this court, sue Craig's heirs or representatives in her own right.

Appellee filed his claim at Pueblo on the 23 October, 1872. (Transc., 285.) His conveyance to Hallum, under whom Mrs.

Farnsworth held, was made on the 1 July, 1873, when Hallum was his counsel to prosecute that claim. (*Id.*, 84.) The conveyance was made, therefore, *pendente lite*, and cannot affect the trial of the appeal before the commissioner, (Decis. of Dept. of Int. relating to Pub. Lands, II, 378, *380;* III, 110, *111*,) the prime object of this suit; for the U. S. statutes do not require the publication of any *lis pendens*.

Craig might have objected specifically to the non-joinder of Mrs. Farnsworth, by plea or answer, (Rules of Practice in Equity, Nos. 39 and 52,) or even at the hearing. (Rule 53.) But, not having objected at all below, the objection cannot be made for the first time here. Non-joinder "must be taken advantage of before the final hearing." (Ril. Ch., 138; 1 Ala. n. s., 580; 18 *id.*, 576; 24 Conn., 586; 1 Des., 315; 1 Stockt. Ch., 401; 10 Paige Ch., 445; 2 Sandf. Ch., 17; 2 Iowa, 55; 2 McLean, 376; Bouv. Dic., "NON-JOINDER.")

## REPLY TO APPELLANT'S SECOND POINT.

His brief, p. 19, avers that complainant could be entitled to no more than "an undivided interest in the residuum of the lands confirmed after satisfying all the claims of the derivative claimants properly so called; but as there is no residuum for the original grantees, there are no lands to which Leitensdorfer's interest can attach."

The bill does not say that Eugene Leitensdorfer was a derivative claimant, but it says that Thomas Leitensdorfer was a derivative claimant, with actual settlement from May, 1862, till suit. (Transc., 37.) Being an *actual settler*, under a title made by Vigil and Saint Vrain to his brother Eugene Leitensdorfer, (since dead,) Thomas Leitensdorfer was within s. 2 of the act of 21 June, 1860, XII stat., 71, and s. 1 of the act of 25 Feb'y, 1869, XV *id.*, 275; (appendix to this brief, Nos. 3 and 4;) and it follows that he was a *derivative claimant*, and his settlement located his claim and severed it from the unincumbered U. S. lands within the grant.

It is also objected by appellant's brief, p. 21, that the donation of 7 March, 1844, by Vigil and Saint Vrain to Eugene Leitensdorfer, was not legally delivered. The answer to this, is, that delivery to a third person is enough, though he is not the grantee's agent, and though the grantee may not get the deed till after the grantor's death. (4 Kent Com., 456, n. *a*; our brief filed 9 Oct., 1886, p. 40.) Moreover, in 1846, Hatcher, as agent for governor Bent and Eugene Leitensdorfer, was *in possession* of the grant on the Purgatoire or Las Animas river. (Transc., 298.) This fact shows that Eugene Leitensdorfer accepted the donation before the Mexican treaty of 2 February, 1848, (9 stat., 922.) Acceptance com-

pleted the donation, and delivery was not necessary. (Civil Law of Spain and Mex., art. 987.) Cornelio Vigil was killed on the 19 January, 1849, (Transc., 434,) and Ceran Saint Vrain died several years before the 15 November, 1878. (*Id.*)

Respecting this donation, appellant's brief, p. 22, objects that "there is nothing in the record to show that the original deed could not have been procured and placed in evidence." Crittenden, in Saint Louis, was in possession of the original deed, and he told the witness, William A. Bransford, that "he intended to hold on to the deed until Leitensdorfer paid him." (Transc., 438.) The copy, now objected to, was filed in the Pueblo land office, on behalf of Thomas Leitensdorfer's derivative claim, on the 23 October, 1872, during the trial of the claim, (Transc., 287,) without objection by Craig. *This was a waiver of the objection.* Original deeds are not required in trials before registers and receivers. Copies suffice. This question of evidence is fully discussed in our reply to Craig's fifth point, *post.*

## Reply to Appellant's Third Point.

On p. 22 of his brief, appellant objects that complainant and his vendors did not comply with s. 4 of the act of 25 Feby., 1869, by "making locations with specified adjustment of boundaries; and filing the same with the Surveyor General within three months, after the surveys were completed and notice given provided for in the second section of the act," &c.

But s. 4 of the act of 1869 only applies to Vigil and Saint Vrain and to the representatives of their hypothetical residuary interests in the 22 leagues, (commissioner to register and receiver, 23 August, 1870, Transc., 266; commr. to surveyor genl., 23 August, 1870, Transc., 269, *272;* commr. to secretary, 29 July, 1876, Transc., 182, *183,*) and not to the actual settlers holding possession under titles or promises to settle. (Commissioner's instructions, Transc., 266, 269; secretary Delano's decisions of 27 October, 1874, and 23 January, 1875, *id.*, 399, 406.) The grantees were not settlers, and the supposed 11 leagues of each was a float, and it was essential that they should locate their floats and thus let the U. S. dispose of the vast unconfirmed residuum of the grant; but with respect to the actual settlers, with or without title from the grantees, the settlement, as in ordinary preëmptions and homesteads, imported both location and notice. The sole duty of complainant was to establish his claim before the register and receiver within a year from the approval of the subdivisional surveys, (S. 1 of act of 1869; joint res. of 28 Ap., 1870, 16 stat., 373, and appendix to this brief, No. 5.) The limitation ended on the 24 February, 1873, (Transc., 188,) but appellee had filed his claim at Pueblo on the 23 October, 1872. (*Id.*, 285.)

Appellant assumes, on p. 24 of his brief, that complainant was in default because he did not file a location of his claim with the surveyor general. Such filing was not necessary. The jurisdiction of the surveyor general to *survey* these derivative claims of the actual settlers, as vested by the act of 21 June, 1860, s. 2, (12 stat., 71,) was taken away by the act of 25 February, 1869, which substituted the office of the register and receiver as the proper place for the primary establishment of these claims. After the act of 1869, complainant had no duty to discharge with respect to the surveyor general.

## Reply to Appellant's Fourth Point.

The most ominous point in appellant's brief is the 4th, on p. 25, namely,—

"This suit cannot be maintained because the specific lands claimed by Thomas Leitensdorfer are not within the boundaries of the original grant made to Vigil and St. Vrain."

*This question of boundary cannot properly be solved, save by the land office* when these derivative claims shall come up for decision, on their merits, by the commissioner and secretary. We had therefore deferred sifting the intricate and technical question; but as appellant has now raised it in this court, he must be answered.

The survey of *all* public lands of the U. S. and of *all* private land claims confirmed by authority of congress, must be made by the federal surveyors general and their deputies, (R. S., § 2223,) as agents of the commissioner, (*id.*, § 453,) who acts under direction of the secretary. (*Id.*, § 441, 453, 2478; see those sections, appendix to this brief, No. 6.) It is "the duty of the general land office" to cause to be made all the surveys contemplated by the act of 25 February, 1869. (See s. 2 of act.) And, generally, the commissioner's authority "necessarily embraced the examination of all surveys of such private claims, and their correction, until made conformable with the right conferred upon the claimant by legislative act or judicial decree. The surveys of private land claims under Mexican grants in California, were thus subject to his control." (Le Roy *v.* Jamison, 3 Sawyer C. C., 369, by Field, J.; s. c., Lewis' Leading Cases, 608, *621–2.*)

In the Las Animas grant, the bounds fixed by the *juridical possession*, (Transc., 253,) would ordinarily "be accepted as conclusive by our government;" (Van Reynegan *v.* Bolton, 95 U. S., 33, *35;*) and if a question arises whether the operations of the surveyor general have disregarded those bounds, "it must, in the first instance, be determined by the Land Department," * * * "to which the supervision and correction of surveys of private land claims are intrusted." (*Id.*, p. 35–6.)

It follows that if, in the opinion of this court, the complainant has not proved, *prima facie*, a settlement *within the Las Animas grant*, the court will not attempt to fix or define the bounds of the grant, but will leave them to be ascertained by the commissioner when he tries Leitensdorfer's appeal, now pending before him. To know if complainant's settlement is *prima facie* in the grant, the *eye-draft* (Transc., 347,) must be consulted. "The applicant for land usually accompanied his petition with a deseño, or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges." * * * "But where land had no value, and the unit of measurement was a league, such monuments were considered to be sufficiently certain," * * * "and this court have no discretion to enlarge or curtail such grants, to suit our own sense of propriety, or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected." (U. S. *v.* Sutherland, 19 Howard, 363, *364–5*, *per* Grier, J.)

The deseño, here, brings Leitensdorfer's claim *prima facie* within the grant, as will be shown presently; but, if it does not, *the question must be left to the executive*. This is, in substance, a grant of 22 leagues within out-bounds containing 922 leagues. But, "the surveys of confirmed Mexican grants, particularly when they are for quantities lying within exterior boundaries embracing larger tracts, involve the consideration of various matters, not properly the subject of judicial inquiry." * * * "If the survey does not conform to the decree of the board, the remedy must be sought from the Commissioner of the General Land Office before the patent issues, and not in the District Court." (U. S. *v.* Sepulveda, 1 Wall., 104, *108*, *109*, *per* Field, J.)

Moreover, the question whether complainant's claim is in the grant, is not vital. If the grant had been confirmed for its 922 leagues, its bounds would be important; for so much of complainant's claim as might possibly be found, in the end, to be out of those bounds, would be a redundant and illegal appropriation of U. S. land *pro tanto*. It would be an unauthorized enlargement of the grant. But the grant was only confirmed for 22 leagues or 97,650.96 acres; and complainant simply asks the court to let in his claim for a share of that fund, and should that be done, it is not material to the U. S. or Craig whether the claim is in or out of the Las Animas grant. In no case could the cancellation of Craig's title and the allowance of complainant's title, increase the aggregate area of the derivative claims beyond the 97,650.96 acres. Complainant was one of the "actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles, or promises to settle" made by them, and hence is, *prima facie*, within s. 1 of the act of 1869.

But complainant's claim is also *prima facie* within the grant. To show this, parol is admissible. "The courses and distances laid down in a survey, especially if it be ancient, are never, in practice, considered as conclusive; but, on the contrary, they are liable to be materially changed by oral proof, or other evidence tending to show that the documentary lines are not those actually run." (Conn *v.* Penn, Pet. C. C., 496, as quoted 1 Abb. Nat. Dig. of Repts. and Stats., 365, No. 73, ed. of 1867.) Parol is often admissible to identify and ascertain the locality of monuments called for by a description; (13 Pick., 267; 19 *id.*, 445;) and where the description is ambiguous, the practical construction given by the parties may be shown. (1 Metc., Mass., 378; 7 Pick., 274; Bouv. Dict., "Boundary.") Now, Thomas Leitensdorfer's home is in the Las Animas valley, on N. W. ¼ of sec. 24, T. 32 S., R. 63 W.; (Transc., 311;) and his claim covers the valley from a mile below his home up 7 or 9 miles to Trinidad and a mile above it. (*Id.*, 310; 302–3.) On the 15 November, 1878, Thomas O. Boggs swore that he had known the Las Animas grant 25 or 30 years, and that he had known Vigil and Saint Vrain since 1844. (*Id.*, 434.) When asked about the south line of their grant, he said, "I understood it commenced at the northern line of Beabuen and Mirando grant." (*Id.*, 435.) He was then asked "At what point of Zobien and Marando grant does the Las Animas grant commence, and in what direction from there does the southeastern line run and to what point?" "Ans. Commencing at N. E. boundary and running and striking the Arkansas river one league below the mouth of Las Animas river." When asked if complainant's claim is in the grant, he said, "I understand his claim is located in and around Trinidad. I understand it to be in limits of Las Animas grant." (*Id.*)

The Beaubien and Miranda grant has been patented by the U. S., (2 Decisions of Dept. of Int. on Pub. Lands, 591,) for the area contained in the act of juridical possession; but we learn that the government has sued in Colorado, and perhaps in New Mexico, to cancel the patent on the ground that the claim is valid for but 22 leagues. However, the original grant, as surveyed and patented by the U. S., is an irregular square, whose lines run in the general direction of the cardinal points. (Commissioner's map of Colorado of 1881, and his last map of the U. S.) The north line of the grant, which is the south line of the Las Animas grant, is shown as running west, on the deseño of the latter. (Transc., 347.) Now, the witness Boggs when asked "At what point" on the north line of the former does the south-east line of the Las Animas grant begin, said, "Commencing at N.E. boundary and running and striking the Arkansas," &c., (*Id.*, 435,) manifestly referring to a point and not a line, for the term *boundary* "is applied to include the objects placed or existing at the angles

of the boundary lines, as well as to those which extend along the lines of separation." (Bouv. Dict., "Boundary.") But a right line extended, on the maps above cited, from Beaubien and Miranda's N. E. corner to the Arkansas, a league below the mouth of the Las Animas, would leave complainant's claim in the Las Animas grant. In Rafael Chacon *et al.*, (2 Decisions of Dept. of Int. on Pub. Lands, 590, *591*,) the secretary, on the 18 June, 1884, after discussing the question of the east boundary of the Las Animas grant, said, respecting T. 33 S., R. 63 W., which contains the bulk of Leitensdorfer's claim: "The south boundary of Vigil and Saint Vrain is the north line of Beaubien and Miranda; and connecting that line, as located on the official map of New Mexico, in this office, with the east boundary on Mr. Dallas's sketch, the whole of T. 33 aforesaid is included within said limits." Now the maps of Colorado and New Mexico, published by the U. S., show that if the east line, thus sanctioned by the secretary, leaves T. 33 S., R. 63 W., in this grant, it necessarily leaves all of Leitensdorfer's claim in the grant.

This conclusion agrees, in substance, with the evidence of Porcheus L. Wootton, sr. (Transc., 444.) He traveled over the grant in 1836; knew Vigil, Saint Vrain, Eugene Leitensdorfer and Governor Bent; was very familiar with the country through which the east line of the Las Animas grant runs, having traveled over all of it, and he testifies that the line passes about 6 miles south of Trinidad, running to the Arkansas river about 3 miles below the mouth of the Las Animas. (*Id.*) *He also swore that Vigil, Saint Vrain, Bent and Leitensdorfer always claimed the Las Animas Valley to be part of the Las Animas grant.* (*Id.*) Now, the maps show that a right line run from a point 6 miles or 1 township south of Trinidad to a point on the Arkansas a league below the confluence of the Las Animas, would leave complainant's improvements and nearly all of his claim in this grant.

So, Wm. A. Bransford, who had known the grant since 1844, (Transc., 437,) swore that Saint Vrain, Governor Bent, Eugene Leitensdorfer, and other claimants of the grant, always claimed that "the Las Animas river from its source to its confluence with the Arkansas river and one league below is all within the Las Animas grant." (*Id.*, 440.) He added that "the grant took its name from Las Animas river." (*Id.*)

The testimony of Wootton and Bransford thus shows that complainant's land, if not within the *grant* as construed by the technical and rigid rules of the common law, is at least within the acts of 1860 and 1869; for the evidence proves that the land is "upon the tracts heretofore claimed by the said Vigil and St. Vrain," in the words of s. 1 of the latter act, or, is "in the tracts claimed by them," to use the words of s. 2 of the former act.

Calvin Jones knew the grant, complainant's claim, the parties to this suit, Saint Vrain, and the southeast line of the grant. (Transc., 432–'3.) He swore that, in 1863 he, with some Mexicans, helped Col. Means, a surveyor, (since dead, *id.*, 436,) in running the line; that it is over 140 miles long; that it passes south of Trinidad 8 or 9 miles; that complainant's claim "*is within the grant,*" on Las Animas river, extending from 9 miles below Trinidad to 1½ or 2 miles above it, and also running up Gray's creek into the mountains and coal lands; that complainant was at work on his claim in 1862 and has been on it ever since, and has a ditch on it about 1½ miles long, which he made in 1862, and has on it 4 hewed log cabins, and cultivates about 140 acres, and that complainant's improvements are worth about $1,000. (Transc., 432–'3.) Witness came to that country in 1846, and Eugene Leitensdorfer was claiming the land then. (*Id.*, 434.) On the 26 March, 1865, long before Craig filed his claim with Stanton and Cook, he made a warranty deed, as the general agent of Ceran Saint Vrain for the Las Animas grant, to Felipe Baca, for a tract on that river, of 76.92 acres, being lot 117 on "the survey of the Las Animas Grant by Col. Thomas Means." (See deed, Transc., 441.) This tract is in and opposite Trinidad. (Bransford's evidence, *id.*, 440.) And on the 20 January, 1866, Craig, as agent of Ceran Saint Vrain for this grant, also made a warranty deed to J. W. Lewelling, for a tract "lying upon the Rio Las Animas or Purgatoire river, and comprising one mile of the valley of said river, and being described as sections twenty-nine (29) and thirty (30) under the survey of Thomas Means, made in August, 1863, *the field notes of which survey are on file in my office*, said peace or parcel of land containing two hundred and thirty (230) acres," &c. (See deed, Transc., 442.) The deed falsely recites that Ceran St. Vrain was the "*principal* owner and proprietor of a certain grant or parcel of land situated in the Territory of Colorado, and known as the Las Animas grant, made by the Mexican government to Ceran St. Vrain and Cornelio Vigil by *deed of grant* bearing date the ninth day of December, A. D. 1843, and *duly confirmed to the same and to their assigns and legal representatives by the surveyor general of New Mexico, on the 21st day of November*, A. D. 1857," &c. The tract thus conveyed is on the Las Animas river, about 18 miles below Trinidad. (Bransford's testimony, Transc., 440.) Complainant's lower line is on that river, 9 miles below Trinidad. (Transc., 433.)

These 2 deeds by Craig practically admit that the Las Animas valley is in the Las Animas grant; that Calvin Jones' evidence is substantially true in stating that he surveyed the grant in 1863 with Colonel Means and found complainant's claim to be in the grant; and that Craig had the custody of Means' field notes and would have produced them had they not tended to

show complainant's claim to be in the grant. Means' survey is not official and hence is not conclusive; but, as he is dead, (Transc., 436,) his notes and map, like oral evidence, would have been admissible *to show where the east line of this grant is*, (Conn *v.* Penn, Pet. C. C., 496,) especially as they were *adopted* by appellant, and presumably by his alleged principal Ceran Saint Vrain. (1 Metc., Mass., 378; 7 Pick., 274; Bouv. Dict., "Boundary.") These deeds of Craig also admit, in effect, that no formal partition was needed to enable Saint Vrain to dispose of his $\frac{1}{6}$ of the grant, though that share was not defined by any actual settlement of Saint Vrain and was not, in fact, within the protection of the acts of 21 June, 1860, and 25 February, 1869; (and so, likewise, the whole of Craig's title to his own claim rests on deeds not supported by any previous partition. Transc., 194 *et seq.*) Much less, then, was formal partition needed to define complainant's claim; for *it was located by his settlement* and was hence practically exempted, by act of 1869, from formal partition. It seems that Felipe Baca and J. W. Lewelling who thus bought of Craig as agent, are not among the derivative claimants before Stanton and Cook. (*Id.*, 184–5–6.)

Besides the preceding evidence showing that complainant's claim is in the grant, there is a denial by Craig of his counsel's assumption that it is out of the grant. That claim is shown by plats A, B, C and D, forming Exhibit No. 2. (Transc., 284–5.) There is no doubt that Exhibit No. 2 means those plats. (*Id.*, 302, *308*, *317*.) Now, when Craig was sworn he was shown Exhibit No. 2, and said:—I know the Las Animas from source to mouth. I know nothing of township, range or section and therefore know not what this map represents. "I know where Thomas Leitensdorfer lives on the Purgatoire river; know where Trinidad is and the principal points above and below." (*Id.*, 319.) After that he was asked—"Was the land described in Exhibit No. 2 at the time of which you speak regarded as being included within the limits of the Las Animas grant?" He answered:—"If Exhibit No. 2 represents that portion of the Purgatoire to which I have referred, it was." (*Id.*)

The papers forming the original grant consist with the theory that the Las Animas Valley is in the grant. The petition of Vigil and Saint Vrain for the grant (Transc., 251) was, as usual, indefinite. So were the governor's order for juridical possession, the petition of the grantees for the enforcement of the order, and the approval of that petition by Justice Sanchez. (*Id.*, 252.) To ascertain the grant one must therefore look to the act of juridical possession. That instrument (*id.*, 253) says: "We proceeded to the establishment of the mounds (mohoneras) for the boundaries as described in said foregoing petition *and corresponding with the plat*, to which I attached my rubric, and commencing on the line

(north of the lands of Beaubien and Miranda) at one league east of the Animas river a mound was erected; thence following *in a direct line to the Arkansas river*, one league below the junction of the Animas and the Arkansas, the second mound was erected on the banks of said Arkansas river, and following up the Arkansas to one and one-half league below the junction of the San Carlos river the third mound was erected; thence following in a direct line to the south," &c. (Transc., 253.)

This description, read with the deseño, (Transc., 346–7,) shows that the valley of the Las Animas or Purgatoire river, from the north line of Beaubien and Miranda to the Arkansas, is in the grant; otherwise it would have appeared, from the description and the *deseño* that Sanchez crossed and recrossed the river, for he began and ended the lower line of this grant a league eastward of the river. The north line of Beaubien and Miranda was known on the 2 January, 1844, when possession was thus personally delivered to Cornelio Vigil and Ceran Saint Vrain; for, on the 22 February, 1843, Vigil, who joined in receiving this possession, had delivered the juridical possession in the case of the Beaubien and Miranda grant, attended by *Pedro Valdez*, one of the attendants of Sanchez in delivering the possession in the case of the Las Animas grant. (See public, printed doc. entitled "Private Land Claims. New Mexico. I. General Land Office," p. 361.) Moreover, the U. S. have since patented the Beaubien and Miranda grant, (12 Copp's Land Owner, 99; 2 Decis. of Int. Dept. on Pub. Lands, 591;) and the patent, whose lines appear on the commissioner's maps of the U. S and Colorado, remove all "doubt as to the boundaries of the tract." (Morrow *v.* Whitney, 95 U. S., 551, *555*.)

Those maps also show the boundaries of the grant of 1 December, 1843, to Gervacio Nolan, which forms the upper or western line of the Las Animas grant. (See plat of latter, Transc., 346–7; and see Nolan grant discussed, Colorado Co. *v.* Commissioners, 95 U. S., 259.) Probably the Las Animas grant extended from the Las Animas valley inclusive, below, to the lower line of Nolan, above, and from the Arkansas, in front, to the grant of Beaubien and Miranda, and the grant of Charles Beaubien (for which see Tameling *v.* U. S. Freehold Co., 93 U. S., 644,) behind.

The "direct line" bounding the Las Animas grant on the lower or S. E. side, as described in the act of juridical possession and drawn on the deseño, does not mean *una linea recta*, although such are the words in the Spanish original. (Transc., 250.) *Qui haeret in litera haeret in cortice.* "The meaning of particular words, indeed, in acts of Parliament, as well as in other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion in which they are used, and the object that is intended

to be attained." (Broom's Max., 536.) Thus, if a lessee covenants to leave all the timber which was growing on the land when he took it, the covenant will be broken, if, at the end of the term, he cuts it down, but leaves it there. (*Id.*, 534–5.) No man can actually run a straight line 140 miles long through the torrents and thickets, and up and down the cliffs, inseparable from a mountainous land like that in this grant. Much less can it be done by a man who was not a surveyor, and had no instruments, and does not pretend to have measured or marked a line of the grant. The whole value of the tract at the time would probably not have paid the cost of measuring and marking a true *linea recta* from the N. E. corner of Beaubien and Miranda to the mouth of the Las Animas, even had such a labor been practicable or necessary.

The bounding line of Beaubien and Miranda, on the deseño of the Las Animas grant, is shown as a *linea recta* running east and west; and yet the commissioner's maps of the U. S. and Colorado, showing that line as patented by the U. S., prove that it is far from a straight line or a true geographical parallel. So, in the Charles Beaubien claim, justice Sanchez, (who, on the 2 January, 1844, had delivered the possession in the Las Animas grant,) delivered the possession on the 12 January, 1844, thus: "commencing on the east side of the Del Norte River, a mound was erected *at one league distance from its junction with the Costilla River*, thence following up the Rio Del Norte, on the same eastern bank, *to one league above the junction of the Trenchera river*, where another mound was erected; and continuing from west to northeast, *following up the current of Trinchera river* to the summit of the mountain, where another mound was established," &c. (Tameling *v.* U. S. Freehold Co., 93 U. S., 644, *648*.) Now, "following up the current of Trinchera river" means, literally, to wade up stream like a man fishing for mountain trout with a fly; but, as the wading began a league above the stream, it is plain that the words quoted must not be literally rendered; and, looking at the commissioner's map of Colorado, which shows this boundary as patented, it appears that the true boundary is a right line, which does not touch the Trinchera but runs several miles from it, and parallel to its general course, so as to include the stream and its main tributaries.

In 1844, before mining had grown into an established industry in the part of the republic of Mexico containing the above grants, the region was only deemed valuable for grazing and agricultural purposes. Vigil and Saint Vrain asked for their grant because they wanted "sufficient fertile land for cultivation, an abundance of pasture and water, and all that is required for a flourishing establishment and for raising cattle and sheep," &c. (Transc., 252.) The Beaubien and Miranda grant, the Charles

Beaubien grant and the Gervacio Nolan grant, were doubtless sought for the same general ends. Hence it was that these grants were so delivered by the justice of the peace as to embrace the chief streams in their vicinity. Irrigation is essential in that country, and the valleys of streams constituted the value of the grants. In the Nolan grant, therefore, the lower side line began on the Arkansas 1½ leagues below the mouth of the San Carlos, whose valley was in the grant. (Deseño, Transc., 347.) In the Charles Beaubien grant, the lower line ran from the left or eastern bank of the Rio Grande del Norte a league below the mouth of the Costilla creek, and the upper line left the Rio Grande del Norte, on which the grant fronts, a league above the mouth of the Trinchéra river. The commissioner's map of Colorado shows that these two grants respectively embrace the tributaries mentioned here. So, his map of New Mexico shows that the Beaubien and Miranda grant embraces nearly all the head waters of the Canadian river.

It is therefore a reasonable presumption, that when Justice Sanchez began the lower or S. E. line of the Las Animas grant on the north line of Beaubien and Miranda a league east of the Las Animas river, and ended it on the Arkansas a league below the mouth of the Las Animas river, he meant that the whole Las Animas valley should be in the grant. The name of this grant sustains this conclusion. And no doubt Sanchez, in like manner, would have embraced the San Carlos valley in this grant had the valley not been previously appropriated to Nolan. This conclusion respecting the extent of the Las Animas grant derives strength from the deseño. For that document embraces the whole valley of the Las Animas river from its mouth to the north line of Beaubien and Miranda; and the lower or S. E. line of the Las Animas grant, on the deseño, *is about parallel to the main stream of the Las Animas*, cutting, and excluding from the grant, an eastern tributary of that river which joins the river at a point on its eastern bank midway between the N. E. corner of Beaubien and Miranda and the mouth of the river, and is probably the stream called Chicaquaqua creek on the commissioner's map of Colorado.

It follows, that if complainant lived on the Las Animas or Purgatoire river between its mouth and the Beaubien and Miranda grant, he lived on the Las Animas grant. But that his land is on the Las Animas river, between those limits, is shown by all the proof and admitted by Craig. (Transc., 319.) Mountain streams have many tributaries. One affluent cannot form a river. Many affluents must converge to produce it. Hence the Las Animas has many sources. Which makes the main stream is doubtful, and the doubt increases as we ascend, until the river is lost in a multitude of small feeders. This fact has caused much con-

flicting testimony as to the point where the main Las Animas, in its general north-easterly course, crosses the northerly line of Beaubien and Miranda. But the doubt does not affect this case, for the Las Animas is well defined by the time it reaches complainant's settlement.

Such is the rational view of the meaning of justice Sanchez when he bounds this grant on the lower or S. E. side by "a *direct* line to the Arkansas river." The grant should not be distorted to fit the literal meaning of the word *recta* or *direct*. *Aucupia verborum sunt judice indigna*, said that great judge Sir Henry Hobart. Lord Coke said, who sticks to the letter sticks to the bark, and legal niceties are not laws; that words are to be interpreted according to the subject matter; that they ought to wait upon the intention, not the reverse, and are always to be taken in their milder sense. Chancellor Kent said that terms of art should be explained from the art. Calvinus said that words are to be understood in reference to a possible case; that it is better they should have no operation than to operate absurdly; that they are not to be looked at so much as the cause and nature of the thing; that you may disagree with words, nay, you may recede from them, in order that they may be reduced to a sensible meaning; that they should be received most favorably to the thing and the subject matter; that words of a strict signification can be given a wide signification if reason require, and that there is no one who is ignorant that words should be understood according to the subject matter. Lord Bacon said, words are to be so understood that the subject matter may be preserved rather than destroyed. And Spiegelius said, words, however general, are restrained to fitness (*i. e.* to harmonize with the subject matter) though they would bear no other restriction. "In the construction of statutes the land department, like courts of justice, hold that a thing within the letter is not always within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter." (Spaulding on Pub. Lands, § 618, and cases there cited.)

This is a question of boundary, and the cases on that question enforce the above general rules of construction, and show that this grant, reasonably construed, embraces the Las Animas valley, if the *deseño* be taken as Sanchez intended it, *i. e.*, as explanatory of his field operations. And here it is admitted that, whilst the *deseño* embraces, as part of this grant, the whole Las Animas valley, from the north boundary of Beaubien and Miranda to the Arkansas, a true right line, run from any point on that boundary to a point on the Arkansas a league below or east of the confluence of the Las Animas, would cut the latter stream and so exclude part of its valley from this grant.

The act of juridical possession, and the deseño, viewed together, show the Las Animas valley to be the *principal call* as regards the lower or S. E. line of the grant, the sole line in controversy. But "all subordinate calls in an entry must yield to a principal call to which they may be repugnant. If a great and prominent object, immoveable and durable in itself, and of general notoriety, be called for in a location, that object must fix and locate the entry, although other minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator intended to take other land." (Finley *v.* Williams, 9 Cr., 164, *168–9*, by Marshall, C. J.) "*It may be laid down as an universal rule, that course and distance yield to natural and ascertained objects.*" * * *

"We must consider that the construction of the patent is somewhat doubtful. That it is susceptible of two constructions, each of which has some reasons to support it. If it be doubtful, it would seem reasonable not to press the broadest construction against a party who is now in actual possession under a perfectly good legal title." (Preston *v.* Bowmar, 6 Wheat., 580, *582*, by Story, J.)

We hold that this grant covered the whole vacant country fronting on the Arkansas, from the Las Animas river including its valley, to the San Carlos excluding its valley. Now, "The territory lying between two rivers, is the whole country, from their sources to their mouths; and if no fork of either of them has acquired the name, in exclusion of another, *the main branch to its source must be considered as the true river.*" (Doddridge *v.* Thompson, 9 Wheat., 469, *473*, by Marshall, C. J.) The words of the same great man in Newsom *v.* Pryor, (7 *id.*, 7,) describe the Las Animas grant, and are an argument for complainant.—

"It is apparent that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a platt, which he supposed would comprehend the land intended to be acquired. It is now too late to question the validity of grants made on such platts and certificates of survey. From the extraordinary circumstances of the country, they were frequent, and, in consequence of those circumstances, have received the sanction of courts. An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle, cannot be perceived; and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had been actually made.

"In consequence of returning platts where no actual surveys had been made, and where the country had been very imperfectly explored, the description contained in the patent often varies materially from the actual appearances of the land intended to be acquired. Natural objects are called for in places

where they are not to be found; and the same objects are found where the surveyor did not suppose them to be. In a country of a tolerably regular surface, no considerable inconvenience will result from this circumstance. The course and distance of the patent will satisfy the person claiming under it, and seldom interfere with the rights of others. But in a country where we find considerable water courses and mountains there must be more difficulty. The surveyor calls for some known object, but totally miscalculates its courses, distances, or both, from some given point which he has made the beginning of his survey; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is to run south 894 poles, to a stake, crossing the river. This distance will not reach the river; and must be continued to 1,222 poles, to cross the river. The distance must be disregarded, and this line so extended as to cross the river, or the distance must control the call for crossing the river.

"These difficulties have occurred frequently, and must be expected to occur frequently where grants are made without an actual survey. Some general rule of construction must be adopted; and that rule must be observed, or the conflicting claims of individuals must remain forever uncertain.

"The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. It is, that the most material and most certain calls shall control those which are less material, and less certain. *A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance.* These decisions are founded on two considerations. Generally speaking, *it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land;* and, in every case where a natural object is mentioned, it designates the land surveyed had there been an actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake crossing the river. Now, it is much more probable that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river." (Newson *v.* Prior, 7 Wheat., 7, *8–9–10.*) This is deservedly a leading case on questions of boundary, and is relied on in Brown *v.* Huger, 21 How., 305, *321;* Higueras *v.* U. S., 5 Wall., 827, *836;* County St. Clair *v.* Lovingston, 23 *id.*, 46, *62.*

In M'Iver *v.* Walker, (9 Cr., 173,) which was ejectment, the certificate of survey and the patent, of defendant, ignored Crow Creek; and the courses and distances called for in them would have excluded all of the creek and the land in defendant's posses-

sion. *But the patent referred to a plat annexed, which laid down the creek as passing through the patented tract.* This court, by Marshall, C. J., reversed the judgment below which had been against McIver, the defendant there, and *directed that the grant be so run as to include Crow Creek, and to conform as near as may be to the* PLAT ANNEXED *to the said grant.* Said this court, (Duvall, J., dissenting,) after stating the rule that, if water courses, &c., be called for, "distances must be lengthened or shortened, and courses varied so as to conform to those objects;—"

"The laws of the state require this annexation. In this plat, thus annexed to the patent and thus referred to as describing the land granted, Crow Creek is laid down as passing through the tract. Every person having knowledge of the grant, would also have knowledge of the plat, and would, by that plat, be instructed that the lands lay on both sides of the creek. There would be nothing to lead to a different conclusion but a difference of about five degrees in the course, should he run out the whole chain of surveys in order to find the beginning of No. 12; *and he would know that such an error in the course would be corrected by such a great natural object as a creek laid down by the surveyor in the middle of his plat.* This would prove, notwithstanding the error in the course, that the lands on both sides of Crow Creek were intended to be included in the survey, and intended to be granted by the patent." (M'Iver *v.* Walker, 9 Cr., *178, 179.*) These views were affirmed when the case came up again. (McIver *v.* Walker, 4 Wheat, 444, *452.*) The case in 9 Cr. is also relied on in Croghan *v.* Nelson, 3 How., 187, *193.*

If Chief Justice Marshall, therefore, is a safe guide, the Las Animas grant should be so run as to include Las Animas valley, and to conform as near as may be to the plat annexed to the act of juridical possession; in which case complainant's claim would be found to be in the grant.

Craig's brief, on p. 28, quotes from the deposition of Albert W. Archibald, saying it was filed by complainant, on his own behalf. The truth is, Archibald was a witness against Leitensdorfer, (Transc., 322,) and his evidence was part of the general transcript of complainant's case, as certified by the commissioner and offered in the court below by Leitensdorfer (*Id.*, 235, 115,) as an impartial presentation of his case. The act of juridical possession says that the lower or S. E. line of this grant runs to the Arkansas from a point *on the north line of Beaubien and Miranda* one league east of the Las Animas river. Craig's brief, pp. 29 and 30, construes Archibald as saying that this point is in "the middle of the north line" of T. 34 S., R. 66 W.; but Archibald did not say so. His testimony was, that the point "is near the *centre*" of that township; (Transc., 322;) and even this testi-

mony is not reliable, for the commissioner's map of Colorado shows that the north line of Beaubien and Miranda passes about 3 miles north of the center of the township mentioned.

## Reply to Appellant's Fifth Point.

Appellant's brief, on p. 32, says this suit cannot be maintained because, before it began, complainant's interest had ceased to be his property, or that of Eugene Leitensdorfer or Josephine Farnsworth; and on p. 34 the brief alleges that Thomas Leitensdorfer's interest, is, according to the record, vested in Spence M. Baird's heirs.

Appellant begins the argument of his 5th point with the allegation that the donation of 7 March, 1844, from the grantees to Eugene Leitensdorfer, "provides that said Vigil and St. Vrain may, *at pleasure*, give any lands in the grant to colonists for settlement thereon." (Craig's brief, p. 32.) This is not true. The future gifts to colonists could not be made without Eugene Leitensdorfer's assent; the donation provided that those gifts were to be made "under such stipulations and such arrangements as both parties may agree upon," &c. (Transc., 287.)

Craig's brief, on p. 32, concludes that "If gifts could be made to colonists, it would seem to follow that sales also of lands could be made to them." This is not a just conclusion. It appears from the petition for this grant, (Transc., 252,) and from the deed to Eugene Leitensdorfer, that early colonization was the express object of the grant, and this object would have been defeated had the grantees, themselves the recipients of a governmental bounty, converted it into a speculation at the expense of the colonists. Therefore the deed provided for gifts to families afterwards settling on the grant, but not for sales.

"In his original bill (R., p. 13)," says Craig's brief, "he claims to be acting on behalf of himself and of others, who, according to his statement, on the 11th (MS. p. — of his original bill), claim 40,000 acres, would thus take precedence of the plaintiff's claim," &c. (Craig's brief, p. 32–3,) When the grantees made the donation of 7 March, 1844, to Eugene Leitensdorfer, all the owners, namely, the grantees, Leitensdorfer and Manuel Armijo, (Transc., 170,) were tenants in common; and the right to make future gifts to colonists probably referred to future donations of the undivided grant. But it does not follow that the grantees retained the right to dispose of Thomas Leitensdorfer's derivative claim; for under the act of 25 February, 1869, that became his separate property. Besides, Eugene Leitensdorfer never *agreed* to any such disposition. Nor does it appear that any appealing derivative conflicts with Thomas Leitensdorfer's claim, or has a title founded on a *gift agreed* to by Vigil and Saint Vrain and Eugene Leitensdorfer.

"While the title to the Leitensdorfer interest was held by S. M. Baird," says Craig on p. 33 of his brief, "a very large share of it passed to others by deeds, as follows," &c. The 4 deeds thus cited are in the Transcript, p. 200, 206, 208, 202. They cover but 3 miles of the narrow valley of the river Huerfano, a small tributary of the Arkansas, many miles distant from the Las Animas valley, *and form no part of appellee's claim.* The deed of 5 November, 1859, from Ceran St. Vrain and S. M. Baird to Mrs. Anna Caroline Houghton, (Transc., 200,) is a mere quit claim "of undivided interests" in 2 miles of the Huerfano valley, showing that the title of Craig, who afterwards bought her out, is not founded on actual partition. Of the 2 deeds for this land from Mrs. Houghton to Craig, that for ½ a mile of the valley, (*id*, 206,) is an express quit claim, and that for the remaining 1½ miles of the valley only warrants the title against herself and her heirs and assigns. (*Id.*, 208.) The deed to Craig of 1 July, 1860, by Joab Houghton, as agent of Saint Vrain and Baird, and others, is an express quit claim for a mile of the Huerfano valley. (*Id.*, 202.)

It is said by Craig's brief, p. 33, that before this suit began *many thousand acres of the sixteen thousand claimed by complainant before Stanton and Cook, were conveyed to the U. S.* These conveyances were mere relinquishments, and are explained on p. 37–39 of our brief for appellee filed on the 9 October, 1886. Appellee's home is on the N. W. ¼ of s. 24, T. 32 S., R. 63 W., (Transc., 311,) and his improvements, worth $1,000, (*id.*, 433,) are on the N. ½ of s. 24, and the conterminous S. W. ¼ of sec. 13. (*Id.*, 317.) His derivative claim covers the W. ½ of s. 13, and all of secs. 22, 23 and 24, (Transc., 284–5, plat A,) and many other lands; and the tracts thus specified, containing 2,240 acres, have never been relinquished. Our former brief, p. 38, shows that when this suit was filed appellee's claim embraced at least 9,960 acres not relinquished, whereas, to sustain the bill, a value of $500 sufficed. (Act 3 March, 1875, s. 1, 18 Stat., Part 3, p. 470.) But, as explained on p. 39 of our former brief, the matter in dispute in this suit is Craig's claim. The bill asks the court to cancel Craig's title, not to establish Leitensdorfer's; and it is not to be denied that the value of Craig's claim suffices to give jurisdiction to this court, and, *a fortiori*, to the court below. Said Chief Justice Waite, delivering the opinion in Hilton *v.* Dickinson, (108 U. S., 165, *174*,) "it has always been assumed, since *Cooke v. Woodrow, supra*, that when a defendant brought a case here, the judgment or decree against him governed our jurisdiction," &c.

"And after the Leitensdorfer claim had been submitted to the Register and Receiver for decision," says Craig, on p. 33–34 of his brief, "*one-half the claim was sold through the agency of the Receiver, Cook, nominally to Joseph S. Adams, the deed*, properly executed,

was placed in the hands of the receiver, with the promise on his part *to return the deed to the grantor, or the $25,000 named in said deed*, to be equally divided between John Hallum and Thomas Leitensdorfer. The deed was not returned, but was recorded."

The deed here mentioned was intrusted to the receiver by John Hallum, appellee's counsel at the time; and, by the statement just quoted, Craig's counsel intimate, what is plainly alleged in his answer, (Transc., 69,) that the whole transaction was an attempt "to bribe the said register and receiver," &c. This charge in Craig's answer is considered on p. 33–35 of our brief of 9 October, 1886. As to the insinuations quoted above from Craig's brief, it may be added here that no sale, nominal or otherwise, was made to Adams. The only evidence touching the alleged sale is Hallum's testimony. Respecting the property to be sold, he swore "Mr. Cook told me that Adams had declined to take it." (Transc., 85.) Nor is it true, as alleged by Craig's brief, that Cook promised "to return the deed to the grantor, *or* the $25,000 named in said deed." Cook represented to Hallum that "if he, Adams, did not take the property and pay for it, then he, Cook, would return the deed to me." (Hallum's testimony, Transc., 85.) Craig's brief, p. 34, ends the matter with the remark that "If the receiver failed to pay over the $25,000, as he had agreed, he simply remained indebted in that sum. (Hallum's deposition, R., 84.)" This inference is not sustained by the facts. The land was not sold, to any one. If Adams had taken the property, and paid Cook for it, Cook would then have owed the former owners the price received by him; but the sole proof about the matter shows "that Adams had declined to take it," (Transc., 85,) and that in fact no such man existed. (*Id.*, 85–6.)

This deed was an escrow. Hallum left it with Cook to be delivered to Adams on the payment by Adams to Cook of $25,000 cash. This condition was never performed. "No consideration whatever was ever paid in any way, shape, manner, or form for this escrow," said Hallum. (Transc., 85.) But, "An escrow has no effect as a deed till the performance of the condition; 21 Wend. 267; and takes effect from the second delivery; 1 Barb. 500." (Bouv. Dict., "Escrow.") Here, had the deed been delivered to Adams, it would have been void for non-performance of the condition on which it had been first delivered by Hallum to Cook; but it was never delivered to Adams. Cook, since dead, told Hallum "that it was in his safe at Denver;" (Transc., 85;) and he promised to get and return it to Hallum, (*id.*,) which itself presumes that there was no sale. There was no sale also, because a buyer is essential to that contract, and here there was no buyer. Adams did not exist. But, if he had existed, and the deed had been delivered to him by Cook, or even by the owners of the land, the deed would have been void for want of consideration.

(2 Bla. Com., 445; Bouv. Dict., "Consideration" and "Nudum Pactum.") A deed under seal imports consideration; but Hallum's deed is not in the record, and it does not appear whether it was under seal or not. Though Craig's answer avers (Transc., 69,) that this deed was an attempt to bribe Stanton and Cook, he neither offered Stanton to prove the attempted bribery, or the deed to prove itself. All that is known of the deed is Hallum's evidence about it, which he qualifies by the statement that no consideration passed for the deed. And this statement must now be taken as established, for what is proved by parol alone, may be explained by parol alone. If Hallum's transaction with Cook was undertaken by Hallum with intent to influence the decision of Stanton and Cook, Hallum was guilty of an infamous offence. (R. S., § 5451, and statutes there cited.) And if Eugene Leitensdorfer, who, like Hallum, seems to have been a general agent of complainant, took part in the transaction, he too was guilty. But, as the attempt at bribery, if it ever occurred, was not within the scope of the authority of those agents, and was not known to complainant or authorized or ratified by him, he is not at all responsible for it, legally, criminally or equitably. "The principal is never criminally answerable for the act of his deputy; they must each answer for their own acts, and stand or fall by their own behaviour. To affect the superior criminally by the act of his deputy, there must be the command of the superior for the act in question." (Paley's Agency, 230, 2d Amer. ed., and cases there cited.) For all the purposes of this suit the deed to Adams has no more effect than if it had never been written. It has never existed in law.

But, on p. 34 of Craig's brief, he says that complainant, in 1867, conveyed all of his interest in this grant to Spence M. Baird, and that "the same, so far as this record shows, is still vested in the heirs of said Baird." This surmise is not sustained by the record. On the 24 February, 1860, Eugene Leitensdorfer, being in embarrassed circumstances, executed to Spence M. Baird, without consideration, a deed for his $\frac{1}{6}$ interest in this grant. The deed is not in the transcript, but is mentioned by Eugene Leitensdorfer. (Transc., 286.) After that, on the same day, Baird gave Leitensdorfer a power of attorney to sell the property, or lease it and collect the rent, and to collect other demands owing to Baird, &c. (*Id.*, 295.) On the 10 December, 1861, Leitensdorfer, for himself and as Baird's agent, made, for $1,200 cash, a deed to complainant of all of the vendors' interest in the Las Animas grant. (*Id.*, 292.) In 1867, complainant, being involved a little, made a deed to Baird, without consideration, for the $\frac{1}{6}$ of the grant, reserving 10 acres. The evidence of the deed is the statement of complainant. (*Id.*, 312.) But, on the 22 May, 1872, Eugene Leitensdorfer again, for $500

cash, for himself and as Baird's agent, made a deed conveying all their interest in the grant, to complainant. (*Id.*, 294.) Baird died about the 5 June, 1872, (*id.*, 314,) and on the 23 October, 1872, complainant filed his derivative claim with Stanton and Cook. (*Id.*, 285.)

Craig's brief assumes that Baird's power to Eugene Leitensdorfer of 24 February, 1860, became *functus officio* by the agent's deed of 10 December, 1861, to complainant; so that complainant's deed to Baird of 1867 permanently conveyed to Baird $\frac{1}{6}$ of the grant, and Eugene Leitensdorfer's deed of 22 May, 1872, to complainant, conveyed no interest. The brief of appellant, on p. 36, also says that Baird's power is not proved, because the original was not produced or accounted for, and because there is no proof of Baird's signature to the original, or of any acknowledgment of the original by him.

These objections of Craig will now be considered.

*Baird's power to Eugene Leitensdorfer did not become* functus officio *by the agent's first sale.* It was a very general power to take possession of all "real estate whatsoever in the State of Missouri and the Territory of New Mexico whereof I *may in any way* [be] entitled or interested;" to sell all or part of it on such terms as the agent might think right, and make deeds for the same with or without warranty, and, until sale, to let the same for the best rent that can be had; to collect all sums to become due under such sales and leases, or to compound for the same; to "receive all such sums of money, debts, rents, goods, wares, dues, and accounts *and other demands whatsoever which are or shall be due or owing, payable, and belonging to me,* or detained from me in any way or manner, or ways or means whatsoever, by any person whomsoever;" and generally all things whatsoever needful to be done in the premises, to do and execute as amply, to all intents, as I might if personally present, "*or, as the matter required more special authority than is herein given,* hereby ratifying," &c. (Transc., 295–6.) This power was signed, sealed and delivered by S. M. Baird, before William J. Floyd as subscribing witness; the original was recorded 1 June, 1872, in Las Animas county, Colorado, before Baird's death; a copy was certified from the record, by the recorder, on the 3 February, 1873; and this copy, on the 18 February, 1873, was filed, as one of the proofs in appellee's claim, with Register Stanton. (*Id.*, 296–7.)

This is just such an omnivorous power to sell, lease, and administer property, as a nominal owner would probably give to the real owner, to enable the latter to continue the management of his own affairs. It does not specify any property, nor is it limited to Baird's present property; but it relates, says Baird, to any land in Missouri or the then territory of New Mexico, "whereof I may in any way [be] entitled or interested." His words are not

*whereof* I AM *in any way entitled or interested.* The word *may* embraces the future, and is in harmony with the generality of this power and with the acts of the parties. It is provided in art. I, sec. 2 of the constitution, as it read before the 14th amendment, that "Representatives and direct Taxes shall be apportioned among the several States which *may be* included within this Union, according to their respective numbers," &c. (R. S., p., 18.) Here is a constitutional exposition of the word *may;* a practical declaration by practical men that the word embraces the present and future.

Eugene Leitensdorfer, on the 24 February, 1860, without consideration, for his own convenience alone, made a nominal deed of his land to Baird, who afterwards, on the same day, made to Leitensdorfer the power in question. As neither Baird or his heirs ever claimed, before the register and receiver, the land in complainant's derivative claim, the presumption is that the beneficial interest in it remained in Eugene Leitensdorfer notwithstanding the deed; and this presumption is supported by the latter's testimony, and by the fact that he made the deeds of 10 December, 1861, and 22 May, 1872, to complainant "*for himself* and as attorney-in-fact for S. M. Baird," (Transc., 292, 294.) Had Eugene Leitensdorfer been only Baird's agent, he would not have used these words: his testimony is clear that his deed to Baird of 24 February 1860, was made, without consideration, to protect his own interest. (Transc., 286.)

Hence the power to Eugene Leitensdorfer was *a power coupled with an interest* in the land afterwards twice conveyed, under the power, to complainant. The interest of Eugene Leitensdorfer was an interest in the land, and not merely in the proceeds of its sale. Such a power, so far from being revoked by any sale under it, could not have been revoked even by Baird's death had that occurred before the second sale to complainant. (Story's Bailments, § 205; Story's Agency, § 488, 489; Boone *v.* Clarke, 3 Cranch C. C., 389.) "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death." (Hunt *v.* Rousmanier, 8 Wheat., 174, *203, per* Marshall, C. J.)

*This power, therefore, was a continuing power; for such is the meaning of its words, and it was a power coupled with an interest.*

The deed of 24 February, 1860, from Eugene Leitensdorfer to Baird, and the deed of 1867, from Thomas Leitensdorfer to Baird, are not in the record. But, if valid, they created resulting trusts in favor of their respective grantors, "and in all cases where there is a resulting trust," it may be established by parol. (Babcock *v.* Wyman, 19 Howard, 289, *300;* cited, Jackson *v.* Lawrence, 117 U. S., 679, *681.*) In truth, as Craig did not try to

prove those deeds, and they were established solely by the candid, parol testimony of their grantors, the deeds of course could be qualified by like testimony; for "he that institutes may also abrogate, most especially when the institution is not only by, but for himself;" (Sydney's Discourse concerning Government, p. 15;) and *verborum obligatio verbis tollitur, nudi consensus obligatio contrario consensu dissolvitur.* (Digest, 50, 17, 35; Broom's Max., 686.) Now, the deed of Eugene Leitensdorfer to Baird, as well as that of Thomas Leitensdorfer to Baird, was without consideration, (Transc., 286, 312,) and was therefore a *nudi consensus obligatio;* for "*Nudum pactum* is where there is no consideration for the undertaking or agreement." (Digest, 2, 14, 7, § 4; Bouv. Dict., "Maxim.") But, *ex nudo pacto non oritur actio.* (Code, 2, 3, 10; 5, 14, 1; Broom's Max., 583.) "A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law." (2 Bla. Com., 445.) It is void, for "Consideration is of the very life and essence of a contract." (Bouv. Dict., "Consideration;" and see *id.*, "Nudum Pactum.")

There are cases where the instrument itself presumes consideration, as notes, bills, and specialties or contracts under seal; but nothing is known of these two deeds save by parol, and that evidence does not show that the deeds were under seal, or recorded, but does show that they were made without consideration. They were therefore void,—void as against the creditors of Eugene and Thomas Leitensdorfer and void as conveyances to Baird. It follows that complainant's interest is not "vested in the heirs of said Baird," as alleged on p. 34 of Craig's brief. The nullity of the deeds is another reason why Baird's power to Eugene Leitensdorfer should be sustained as a continuing power. Courts always lean in favor of the execution of a power, if it can be supported. (Warner *v.* Howell, 3 Wash. C. C., 12; Segee *v.* Thomas, 3 Blatchf., 11.) As an unquestionable settler under act of 25 February, 1869, and as a derivative claimant under Vigil and Saint Vrain, Thomas Leitensdorfer rightly invokes a liberal construction of his paper title. Possibly the acts of 21 June, 1860, and 25 February, 1869, required that he should, besides proving his settlement, produce the mesne conveyances through which he derived his title; *but, if so, the requirement was made simply to enable the executive department "to determine if there was a bona fide claimant before it under a Mexican grant."* (Castro *v.* Hendricks, 23 How., 438, *442:* and see U. S. *v.* Percheman, 7 Peters, 51, *97;* U. S. *v.* Patterson, 15 How., 10; U. S *v.* Sutter, 21 *id.*, 170, *182.*) Complainant's paper title may not be perfect. He does not ask the court to declare or make it so. He only asks to be allowed to prove his case before the commissioner and secretary.

But Craig's brief says, on p. 35, that the deeds of Eugene and Thomas Leitensdorfer to Baird were made in fraud of creditors. If so, this is one more ground for holding the deeds void. This court, however, cannot consider the rights of creditors in this action. Their rights must be enforced by themselves. The deeds did not hurt Craig, and *actio non datur non damnificato.* Any creditor of Eugene Leitensdorfer or of complainant, having a right to the latter's land, will be benefitted by this suit if successful; for, if the suit succeeds, Thomas Leitensdorfer's appeal, now before the interior department, will be tried, and his claim, now defenceless, will be confirmed, *and the confirmation must enure to the true owner of the soil.* (Lessee of French *v.* Spencer, 21 How., 228, *239–40.*) Complainant, at his own cost, is perfecting his title for the benefit of whom it may concern. It is not possible that any creditor whatever of Eugene or Thomas Leitensdorfer can be hurt by such a proceeding. But there is no evidence that, on the 23 October, 1872, when complainant filed his claim before Stanton and Cook, either he or his brother Eugene was in debt. Complainant's resumption of his property, in his own name, by the deed of 22 May, 1872, from Eugene Leitensdorfer acting for himself and Baird, rather implies that complainant, at least, was once more free from debt.

It is wrong, though common, for a failing man to mask his land from creditors; but Craig is not in position to criticise the wrong. On the 20 January, 1866, as Ceran Saint Vrain's general, resident agent for the Las Animas grant, he sold a tract on the Las Animas or Purgatoire river, to J. W. Lewelling, for a "valuable consideration" (probably $1,600,—see Transc., 220,) alleging in the deed (*id.*, 442,) that the Las Animas grant had been "duly confirmed" by the surveyor general to Vigil and Saint Vrain, and to their assigns and legal representatives; whereas that officer had no power to confirm, (public act, 22 July, 1854, s. 8, 10 stat., 308,) and the public act of 21 June, 1860, s. 2, (12 stat., 71,) preferred the rights of derivative claimants to those of Vigil and Saint Vrain, and required the hypothetical residue due those grantees to be located, not piecemeal on the Las Animas river or elsewhere, *but in 2 equal squares within the grant.* But *no* location has ever been made. Besides, "there is no residuum for the original grantees." (Brief for appellant of 5 October, 1886, p. 19.) If it is bad to circumvent one's creditors, it is worse to circumvent a purchaser for value.

The legal effect of the successive deeds, &c., involved in Craig's fifth point, was as follows.—Eugene Leitensdorfer's deed of 24 February, 1860, to Baird, having been made without consideration and to evade creditors, was null, and does not exist in law. Baird's subsequent power to Eugene Leitensdorfer, of the same day, being, by its terms, a continuing power, and being also a

power coupled with an interest in this land, could not be revoked by Baird's death or by any act of his, but left Leitensdorfer's right and power to dispose of the land wholly untrammeled. Eugene Leitensdorfer's deed of 10 December, 1861, for himself and Baird, to Thomas Leitensdorfer, for $1,200, cash, being accompanied by an immediate transfer of possession, continuing, without intermission, till the filing of this suit and afterwards, (Transc., 420, 423,) conveyed to complainant the entire interest in his derivative claim. Complainant's deed of 1867 to Baird, being made without consideration and to evade creditors, was null, and does not exist in law. Under this deed, Baird, who had been complainant's legal adviser, (*id.*, 311,) filed a claim with the surveyor general, dated 17 July, 1869, for appellee's ranch, where Baird then lived, (*id.*, 101,) limiting the claim to 2,560 acres. (*Id.*, 375.) But appellee testified that this was done without his authority. (*Id.*, 311.) It was also without authority of law, and hence void, for the act of 25 February, 1869, had taken away the surveyor general's jurisdiction and vested it in the register and receiver exclusively. The proceeding, therefore, before the surveyor general, seems, in fact, not to have been pursued. Whatever interest Baird took under the deed of 1867, could not have exceeded that of a trustee in a resulting trust, the beneficial interest remaining in complainant as *cestui que trust*. Eugene Leitensdorfer's deed to his brother Thomas, of 22 May, 1872, for $500 cash, was made for himself and Baird, and clothed the real interest which had existed in Thomas, ever since the 10 December, 1861, with the nominal interest of Baird, who died on the 5 June, 1872, without filing any claim before Stanton and Cook for appellee's ranch. The claim before those officers was filed by Thomas Leitensdorfer, on the 23 October, 1872, when he was exclusive owner and occupant.

The acts of Baird and appellee sustain the theory that appellee continued the owner of his derivative claim from the date of the deed to complainant of 10 December, 1861, down to the filing of his claim by him. Baird was a lawyer, (Transc., 311,) and would himself have filed the claim before Stanton and Cook, under the act of 1869, had he owned it. The various relinquishments in the record, (p. 333–335,) made to the United States, were by complainant: none of them were by Baird or his heirs. Craig overhauled the relinquishments, (p. 64, *et seq.*, of "Evidence in behalf of Appellant in support of motion for rule to show cause,") and found none from Baird or heirs. The meaning of these relinquishments is explained on p. 37 of our brief, on the merits, of 9 October, 1886.

Thomas Leitensdorfer proved that, from the date of his deed of 1867 to Baird, down to Baird's death in 1872, appellee was the owner, in possession, of this derivative claim. (Transc., 312.)

Eugene Leitensdorfer testified that his brother Thomas had been in continuous possession of the grant from 10 December, 1861; (*id.*, 420;) that Thomas built, in 1862, what is known as the Leitensdorfer ranch, and had always exercised full dominion over it; (*id.*, 423;) and that Baird never claimed an interest in the grant adverse to witness or to Thomas, nor did Baird's heirs or representatives save as to a Trinidad town lot. (*Id.*, 421.) The witness also testified that the claim of Cassandra E. Baird, wife of Baird, to $\frac{1}{16}$ of the grant, was not in conflict with the interest of witness. (*Id.*) The evidence of Eugene Leitensdorfer is corroborated by Mrs. Farnsworth. (Transc., 427.) Obadiah M. Smith, a witness for complainant before Stanton and Cook, when cross-examined by Bradford, Chilcott and McDonald, who, it seems, were of counsel for Craig, said that Baird and his family lived on complainant's derivative claim during part of 1869, "but did not occupy it as his property to my knowledge." (Transc., 318.) "Leitensdorfer," said Smith, "always claimed it as his property to me. Judge Baird claimed it, but he said that it was Leitensdorfer's property." (*Id.*) This explains Baird's claim of 17 July, 1869, to appellee's ranch, as filed with the surveyor general. (*Id.*, 101.)

Calvin Jones, sworn for Thomas Leitensdorfer, on the 15 November, 1878, said that witness came to Las Animas county in 1862; that Leitensdorfer was at work on his claim then, and "has been on it ever since to present time;" (Transc., 433;) that witness knew Baird well; that Baird never claimed the Leitensdorfer ranch as his own property, but "held it for Eugene Leitensdorfer as a matter of friendship." Witness had lived in the country since 1846. (*Id.*, 434.)

*Baird's power to Eugene Leitensdorfer was sufficiently proved before Stanton and Cook.* Appellee published a notice to the claimants of the Las Animas grant, that on the 15th of October, 1872, he would proceed to prove his claim before the register and receiver. (Transc., 284–5.) Accordingly, on that day, E. C. Holmes, J. W. Henry and G. A. Hinsdale appeared for him; and Bradford, Chilcott & McDonald, and H. C. Thatcher, apparently in Craig's interest, opposed appellee's claim. (*Id.*, 297.) From time to time evidence was offered and witnesses examined, by the respective counsel, and the case continued. On the 6 February, 1873, Craig was examined by Thatcher, and cross-examined by Holmes for Thomas Leitensdorfer. (*Id.*, 318.) The case was then continued to 18 February, 1873, when Hinsdale, for Leitensdorfer, filed paper 9, (*id.*, 297,) being the copy of the power from Baird to Eugene Leitensdorfer, (*id.*, 295,) and the case was closed. *No objection was made by Craig's counsel to this copy,* nor did complainant object to the copies offered by Craig, who opened his case on the 21 Feb-

ruary, 1873. No. 1, the first paper offered by Craig on that day, was a copy. (Transc., 195–6.) So was paper No. 2. (*Id.*, 198.)

*The bureau and department do not require original deeds, &c., to be filed.* Certified copies suffice. (*E. g.*, R. S., § 2321.) The chief ground of this rule is, that "no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver." (Rule of Practice 50, 12 Copp's Land Owner, 155.) As originals, by this rule, could not be recovered from the local office, and might get lost or mislaid, and as copies of them, certified by the local officers, might be unavailing in court, it would be unreasonable to require originals to be filed with those officers. There is no rule, therefore, which makes such a requirement; and hence, when the claims of Leitensdorfer and Craig were tried before Stanton and Cook, no objection was made on either side to copies offered by the other side. If copies are objected to by the opposite party, which, it is believed, never occurs in practice, "the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the Commissioner." (Rule 41, XII Copp's L. O., 155; Spaulding on Pub. Lands, § 537, p. 298.) The present rules took effect 1 September, 1885. They are a reprint of those which took effect 1 February, 1881, (7 Copp's L. O., 170, rules 49, 41; Spaulding on Pub. L., § 537, p. 299, 298,) and spring from those approved by the secretary, on the 29 November, 1875, (2 Copp's L. O., 154–5,) which, as to the two rules quoted above, embody the practice of the bureau from the beginning.

In the trial of complainant's claim before Stanton and Cook, his counsel often objected to questions propounded on Craig's behalf; (*e. g.*, Transc., 302, 317, 318, 319;) and of course, as this right of objection was reciprocal, Craig's counsel would have objected to the admission of this power of attorney had they wished. They seemed to have assumed that the register and receiver were favorable to Craig, and had final jurisdiction. But their waiver of objection bound Craig. (Broom's Max., 103.) "*Consensus tollit errorem* is a maxim of the common law and the dictate of common sense." (*Id.;* 7 Johnson, 611.) "Had the objection been taken before the trial—either at the examination of the witness or on a motion to suppress—to the proof of the copy without producing the original or showing its loss, the opposite party would undoubtedly have secured the production of the original, if in existence, or, if it be lost or destroyed, been prepared to account for its absence." (York Co. *v.* Central R. R., 3 Wall., 107, *114.*) The objection, now, is "to be considered as finally waived." (Blackburn *v.* Crawfords, *id.*, 175, *191–2.*)

Here, the original was filed with the recorder of Las Animas county, Colorado, so late as 1 June, 1872; (Transc., 296;) and, had the copy offered on the 18 February, 1873, been objected to,

doubtless the original would have been produced and Baird's signature proved. Why Stanton and Cook, in their elaborate opinions on the respective claims of Craig and Leitensdorfer, objected to copies offered by Leitensdorfer, (Transc., 326, 327,) and not to copies offered by Crag, (*id.*, 223,) we leave the court to consider.

## Reply to Appellant's Sixth Point.

Point sixth of Craig's brief, (p. 36,) is that Thomas Leitensdorfer fails "to point out any error in the decision of the Register and Receiver in rejecting his claim."

Whether that decision is right or wrong, it is appealable. Leitensdorfer appealed, (Transc., 331,) alleging the errors of Stanton and Cook. (*Id.*, 332–3.) He has a legal right to the trial of that appeal; but it cannot be tried till Craig's title be canceled. Hence this suit should be sustained, leaving the merits of the respective claims of Leitensdorfer and Craig to be decided by the commissioner and secretary successively, with the aid of such light as may be afforded them by the opinion and decree of this court. The errors of Stanton and Cook in their opinion rejecting Leitensdorfer's claim, and in their opinion sustaining Craig's claim, are obvious; but, as their consideration properly devolves on the commissioner and secretary, the specification of those errors in complainant's bill, was not essential.

The reasons of Stanton and Cook for rejecting complainant's claim, as enumerated on p. 37 of the brief for Craig, are these:

*First.* There was no legal delivery of the deed of donation from Vigil and Saint Vrain to Eugene Leitensdorfer. (This objection is answered in our preceding "REPLY TO APPELLANT'S SECOND POINT," and in our brief of 9 October, 1886, p. 39–40.)

*Second.* That deed reserves the donors' right to dispose of the grant lands to settlers, thereby postponing any right which Leitensdorfer might have to grants by the donors in behalf of others. (See the answer to this in our preceding "REPLY TO APPELLANT'S SECOND POINT," and "REPLY TO APPELLANT'S FIFTH POINT.")

*Third.* The claim under that deed being for an undivided sixth of the grant, could give no right to any one to appropriate any specific part of the grant in severalty. (But see our preceding "REPLY TO APPELLANT'S SECOND POINT.")

*Fourth.* No competent evidence was offered to establish the existence of that deed. (This objection is answered in our brief of 9 October, 1886, p. 39–40. The translated copy of the deed was offered by Thomas Leitensdorfer, as document No. 3, on the 23 October, 1872, Transc., 287, 297, in the trial before Stanton and Cook; and as Craig's counsel did not object to the copy, it is admissible. See conclusion of our "REPLY TO APPELLANT'S FIFTH POINT.")

*Fifth.* No competent evidence was offered showing Eugene Leitensdorfer's authority to convey to Thomas Leitensdorfer on the 10 December, 1861, and 22 May, 1872, as Baird's agent, after Eugene Leitensdorfer had, on the 24 February, 1860, conveyed his interest to Baird to evade creditors. (See answer to this in our preceding "REPLY TO APPELLANT'S FIFTH POINT.")

## REPLY TO APPELLANT'S SEVENTH POINT.

The brief for Craig, on p. 38, says that this suit cannot be maintained, because the evidence relied on before Stanton and Cook shows that no other decision than that rendered by them could have been made on the facts legally proved before them.

But this court is in possession of new facts showing that the decision of Stanton and Cook was obtained by bribery. Therefore, that decision should be annulled. Moreover, we have shown, in our preceding REPLY TO APPELLANT'S FIFTH POINT, that complainant's secondary evidence of his paper title was improperly disregarded by Stanton and Cook. Besides, the bill in this suit asks the cancellation of Craig's title because it was illegally issued in obedience to an illegal order of the president and prevents the trial, by the commissioner, of Leitensdorfer's appeal taken according to law and now pending in the land office here. If Leitensdorfer was entitled to that appeal and the trial of the appeal is illegally obstructed by Craig's title, this suit should be maintained, and that title should be canceled notwithstanding the decision of Stanton and Cook for Craig. That decision has no effect in law, for a lawful appeal from it is pending before the commissioner.

## REPLY TO APPELLANT'S EIGHTH POINT.

On p. 39 of Craig's brief it is said that this suit cannot be maintained, because the decision of Stanton and Cook is final in law and "cannot be attacked as between these parties on a charge of fraud, which, though imperfectly made in the bill, absolutely failed in the proof."

In our brief of 9 October, 1868, p. 62 *et seq.*, we have shown that the decision of Stanton and Cook for Craig was obtained by fraud. It was properly annulled, therefore, by the court below, even admitting that the act of 25 February, 1869, intended generally that such decisions should be final. But we have shown also, on p. 45 *et seq.* of our former brief, that there is no statute or authority attributing finality to such decisions. This court never attributes conclusiveness to the decisions of commissioners, in land cases, unless the terms of the act creating their powers unquestionably preclude all revisory jurisdiction. The act of 8 May, 1822, (3

stat., 709,) elaborately organized a board of 3 commissioners, to be appointed by the president with the consent of the senate, for the ascertainment of private land claims in Florida, (sec. 1,) empowering the board to appoint a secretary, (sec. 2,)—to compel the attendance of witnesses,—to administer oaths,—to demand access to public land records, (sec. 5,) and to command the services of the district attorney and marshal. (Supplemental act of 3 March, 1823, secs. 4 and 6, *id.*, 754.) The act of 1822 gave the board "power to inquire into the justice and validity of the claims filed with them," declaring that the board, "if *satisfied* that said claims be correct and valid, shall give confirmation to them, *Provided*, that such confirmation shall only operate as a release of any interest which the United States may have." (Sec. 5.) Yet chief justice Marshall, in deciding U. S. *v.* Percheman, (7 Peters, 51,) said, "it can admit of no doubt that the decision of the commissioners was conclusive in no case until confirmed by an act of congress." (*Id.*, 94.)

Craig's brief, p. 41, alleges that this land "is not, and never was, any portion of the public land of the United States;" that "Congress did not grant any land," and that this land, therefore, does not belong to the class of "private land claims."

But Craig admits in his answer, (Transc., 60,) that the acts of 1860 and 1869 treat the derivative claimants "more as anomalous homesteaders than as *con*firmees." The Mexican grant was void for want of jurisdiction in the governor to make a grant of 922 leagues, and stands now expressly barred by the act of 25 February, 1869, s. 5,—the act under color of which Craig proved his claim and got his approved plat; so that, if there be no grant of any kind by congress, Craig's title is null, and should be canceled, and the commissioner should be left free to award quarter section homesteads or preëmptions to all the derivative claimants entitled, in his opinion, to them, under s. 1 of the act of 25 February, 1869. The vital question is,—does R. S., § 453, apply to these derivative claims? That section declares that "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government." Whether the claims of Leitensdorfer and Craig belong to the class of public lands or to the class of private claims, is not material. They must belong to one or the other, and in either case they are within R. S., § 453. If so, the commissioner and secretary had power to review the action of Stanton and Cook in deciding the claims of Leitensdorfer and Craig. (See also, R. S., § 441, 2478, and our brief of 9 October, 1886, p. 45 *et seq.*)

On the 8th of February, 1879, (Transc., 115,) complainant introduced in evidence, among other testimony, the document Y, being a transcript of Craig's title as certified by the acting commissioner of the general land office. (*Id.*, 194.) Part of that title is a patent for Craig's claim, dated 8 January, 1878, pending this suit, and delivered to him by the bureau in Washington on the 11 January, 1878. (*Id.*, 228.) This patent plausibly recites that it issued under R. S., § 2447, (*Id.*, 234,) which provides for patenting certain confirmed "claims;" so that Craig's acceptance of the patent is a practical assertion that his claim is a *confirmed claim*, and a practical admission, therefore, that it is within R. S., § 453. It is within that section for the additional reason that the government has issued to him an approved plat for his claim under color of an act which makes the plat equivalent to a patent, and has also issued to him an actual patent; whilst R. S., § 453, clearly gives the commissioner control of "the issuing of patents for all grants of land under the authority of the Government." Craig, on p. 51 of his brief, after quoting s. 4 of the act of 25 February, 1869, admits that "There can be no doubt that the approved plat referred to in the above quotation from the act of Congress *was intended as a substitute for a patent;*" and Judge Dillon, in overruling Craig's demurrer to the supplemental bill, said that his approved plats are "equivalent in legal effect to an ordinary patent as evidence of title." (5 Dillon C. C. Rep., 419.)

It is said on p. 42 of Craig's brief, that *the settlers already had title from Mexico, confirmed by the United States.* This is an error. The sole confirmees were Vigil and Saint Vrain, and it turned out that they had no interest and were therefore mere nominal confirmees. The settlers were not the grantees and hence are not confirmees. They can have no title at all but legally approved plats. Craig's plat and patent, whether legally issued or not, amount to an admission that he claims under the United States. The Mexican title of Vigil and Saint Vrain was void. It is assuredly so now. (Act 25 Feb., 1869, s. 5.)

Craig argues, on p. 43 of his brief, that if the decision of Stanton and Cook for Craig be set aside upon the appeal to the commissioner, "then we are to commence *de novo* before another register and receiver," &c. Such is not the law. The claims of appellant and appellee are pending for review before the commissioner, who, under the secretary's supervision, will, if this court affirms the decree below, proceed to render the decisions which Stanton and Cook should have rendered. An appeal to the commissioner, though convenient and usual, was not essential. Where, as here, "fraud or gross irregularity is suggested on the face of the papers," or "the decision is contrary to existing laws or regulations," (Rule of Practice 48, Spaulding on Pub. Lands, § 537,

p. 299, where the rule is No. 47,) the commissioner will review the case *ex officio*. (Rule 49.) It is possible, though not usual, to remand a case for trial *de novo* before the registers and receivers. Their function is to report facts and their opinions; the commissioner and secretary decide the case finally, and the secretary, on appeal, tries the case *de novo*. (Opinion of solicitor general Samuel F. Phillips, 14 Opinions, 604.) The secretary's power of review is very broad, (R. S., § 441, 453, 2478,) and no rule can take it away. (Rule of Practice 114, Spaulding, Pub. Lands, § 537, p. 306.) If the commissioner, on the merits, decides against Craig, an appeal will lie to the secretary who will try the case *de novo* like an appeal in equity. (Rule of Practice 81; and see the Opinion, Revised Statutes and Rule, last above cited.)

*To show that Stanton and Cook were a special tribunal, exercising final judicial functions*, Craig's brief, on p. 43, cites U. S. *v.* Ferreira, 13 How., 40. That case arose under the Florida treaty of 22 February, 1819, art. 9, last clause, (8 Stat., 252, *260*,) the act of 3 March, 1823, III Stat., 768, and the private acts of 26 June, 1834, VI Stat., 569, and 3 March, 1849, IX Stat., 788, and differs from this case. The Florida treaty left the U. S. no discretion in satisfying claims like Ferreira's, whereas, respecting the grant to Vigil and Saint Vrain, Craig admits "that the obligation of the United States to protect this and similar grants devolved solely on the political department of the Government to be discharged as Congress should provide." (Answer, Transc., 59.) The Florida treaty required claims like Ferreira's to be established "by process of law;" whereas the statute in this case omits to prescribe by what process the derivatives shall establish their claims. The act of 3 March, 1823, S. 1., required a U. S. *judge*, in claims like Ferreira's, to *adjust* the claims, in the first instance, agreeably to the treaty provisions; whereas, in this case, the act of 25 February, 1869, leaves the primary settlement of derivative claims to men having no facilities for attaining a correct opinion, and prescribes no principles of adjustment. In Ferreira's case, the U. S. were represented by a district attorney, whose duty it was, "if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge;" (U. S. *v.* Ferreira, 13 How., *49*;) whereas, in this case, the letter of the act of 1869 contemplated no counsel for the U. S., and provided no means for obtaining evidence against claims and no remedy against improper evidence produced by claimants. The omissions in the act of 1869, thus recapitulated, are intelligible if the act intended that these derivative claims should be adjusted, like homesteads and preëmptions, under the broad and wholesome supervision of the commissioner and secretary.

But Ferreira's case, though different from Craig's in the above respects, is like it in others. The court, in Ferreira's case, (13 How., p. 47,) referring to the award of the judge and to the secretary's decision, declared "that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one." The supplemental act of 26 June, 1834, S. 1., in Ferreira's case, treated the finding of the judge as an "award," subject to the review of the secretary of the treasury; thus showing that if the finding of Stanton and Cook for Craig, in the present case, be an *award of a board of commissioners*, these terms do not necessarily exclude a revisory power on the part of the commissioner and secretary.

Ferreira's case shows that the *award of a commissioner to adjust claims* may be reviewed, first, by the secretary of the treasury, and secondly and necessarily by congress in granting or withholding an appropriation; (see private act of 3 March, 1849;) and here, the act of 1869 would also have doubtless provided for a review of the findings of the register and receiver, had not the general system of land law already done so. The act of 3 March, 1849, in Ferreira's case, guarded against the possibility of fraud and error on the part of the judge, by directing that his adjudication should be made under the act of 26 June, 1834, which subjected the decision to a review by the secretary of the treasury. But here, there is no safeguard at all against fraud or error on the part of Stanton and Cook, if their power be supreme. This court, in Ferreira's case, held that the power of the judge and secretary was not strictly judicial, and that therefore this court had no jurisdiction of an appeal to the court, by the United States, from an award in favor of Ferreira made by the judge of the U. S district court for the northern district of Florida. This decision, which is manifestly right, only shows that no appeal to the courts lies from the decision of Stanton and Cook against Leitensdorfer. Nor is any such an appeal necessary; for, as the special legislation, in Ferreira's case, had amply provided for an executive review of his award, so the general legislation, in the present case, has amply provided for an executive review of the decision of Stanton and Cook in favor of Craig.

That decision was an exercise of judgment and discretion, but not of judicial power: "it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact;" (Murray's lessee *v.* Hoboken land and Impt. co., 18 Howard, 272, 280;) for, "by the constitution judicial power can be conferred by Congress only on the courts." (*Ex Parte* Randolph, 2 Brock. Reports of C. C. decisions of Marshall, p. 447, arising under act 15 May, 1820, s. 2, III stat., 592.) But the fact that the decision of Stanton and Cook for Craig was an exercise of judgment and discretion, does not justify the inference that

those officers were arbitrators, or that the decision was an award, or conclusive. A joint resolution of 1 June, 1860, (12 stat., 873,) in the claim of George Fisher, required the secretary of war to *consider* evidence and *settle* his account, and to make such allowance "as in his opinion justice to the claimant shall require." But in Gordon *v.* U. S., (7 Wall., 188, *194*,) this court held that the finding of the secretary under the resolution was not an award; that he was not an arbitrator, and had no judicial power; and that it was competent for congress, by its joint resolution of 2 March, 1861, (12 stat., 895,) to annul the joint resolution of 1 June, 1860, and all proceedings under it, although the secretary, on 23 November, 1860, had allowed the account.

The brief for Craig, on p. 44, cites *ex parte* Atocha, (17 Wall., 439,) to show the finality of the decision of Stanton and Cook for Craig. The Atocha case arose, indirectly, under the treaty between the U. S. and Mexico of 2 February, 1848, Art. XV, which provided for a board of commissioners of claims, saying their "awards shall be final and conclusive." (9 stat., 933.) The act of 3 March, 1849, (*id.*, 393,) organized the board, which consisted of three commissioners, and Atocha presented his claim to it, with what precise result does not appear. After that, the claim was referred, by special private act of 14 February, 1865, (13 stat., 595,) amended by special private act of 5 April, 1870, (16 stat., 633,) to the court of claims, with directions to *examine into the claim*, and to *adjudicate* it, and to *fix* the amount of the claim if in their opinion it was a just one against Mexico and within the treaty. The amending act authorized the use of certain evidence by the court; but as neither act provided for an appeal to the supreme court, it was held that no appeal lay. (17 Wall., 445.)

But *ex parte* Atocha is not in point. The rules of decision were prescribed in such cases. (Treaty of 2 Feb., 1848, Art. XV, 9 stat., 934; act 3 March, 1849, S. 1, *id.*, 393; act 14 Feb., 1865, 13 stat., 595.) The evidence to be used in Atocha's case, before the court, was defined. (Act 5 Ap., 1870, 16 stat., 633.) Ample facilities were provided for getting evidence in such claims, (Art. XV of the treaty; act 3 March, 1849, S. 3,) and for securing a full and fair trial. (Act 3 March, 1849, secs. 2, 4, 8.) The final judgment in Atocha's case was by the court of claims; the U. S. were represented at the bar, (act 5 April, 1870,) and the usual machinery of courts was of course employed to secure an intelligent and just decision. Atocha's claim was subjected to two examinations before it was paid, namely, the trial before the Mexican claims' commission and the trial before the court of claims. The case shows that when the U. S. refers claims for conclusive adjudication, not to a court, but to commissioners, the board con-

sists of an odd number, the principles of decision are prescribed, elaborate provisions are made by law for securing a full and fair trial, and the statute declares that the award shall be final.

*Ex parte* Zellner, (9 Wall., 244,) is nearer this case. There the question was whether the act of 24 February, 1855, (10 stat., 612,) organizing the court of claims, as amended by act of 3 March, 1863, s. 5, (12 stat., 765,) which allows appeals to this court "from any final judgment or decree which may *hereafter* be rendered in *any* case," would sanction an appeal in cases under the Abandoned Property act of 12 March, 1863, (12 stat., 820,) which allowed the owners to recover the proceeds of such property, by proceedings before the court of claims, "on proof *to the satisfaction of said court*," (sec. 3,) but did not provide for any appeal. The government, before this court, "contended that no appeal being specially given by the Abandoned Property Act, and the whole matter in proceedings under that act being referred to the satisfaction of the Court of Claims, the case was not embraced by the general right of appeal given by the previous act of March 3d, 1863, reorganizing the Court of Claims." (9 Wall., 246.) But this court held that Zellner had a right, under the act of 3 March, 1863, S. 5, to appeal from the adverse decree of the court of claims, saying, "The subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization. If new or additional subjects of jurisdiction were conferred the effect would be, simply, to increase the labors of the court, the cases to be heard and determined under the existing organization." (9 Wall., 246–7.)

So, the act of 3 March, 1851, to ascertain and settle private land claims in California, through a board of 3 commissioners, provided, by s. 9, for a review of their decisions by the U. S. district courts, and, by s. 10, for an appeal thence to this court. (9 stat., 631.) The supplemental act of 1 July, 1864, s. 4, (13 stat., 332,) allowed the district courts, in such cases, if affecting title to land in an incorporated town, to *transfer* the cases to the circuit court for determination; but the act did not provide for appeals, in the latter cases, from the circuit court to this court. Yet, in U. S. *v.* Circuit Judges, (3 Wall., 673,) the majority of the court held that such appeals lie; and this decision was relied on, by the full bench, in *Ex parte* Zellner, 9 Wall., 244, *247*, reviewed above.

On p. 45 of Craig's brief, he cites Johnson *v.* Towsley, 13 Wall., 72. In that case, and in Samson *v.* Smiley, *id.*, 91, both of which came here from the supreme court of Nebraska, the great question was as to the effect of s. 10 of the act of 12 June, 1858, (11 stat., 319, *326*,) which declared that appeals in contests between preëmptors should thereafter be decided by the commissioner, "*whose decision shall be final*, unless appeal there-

from be taken to the Secretary of the Interior." This court, in Johnson *v.* Towsley, quoted "the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and also quoted the above provision from s. 10 of the act of 12 June, 1858; and yet the court held that errors of law by the land officers, might, nevertheless, be corrected in equity. (13 Wall., 83, 82, 86.) The bill of Towsley, (*id.*, 76,) and apparently the bill of Smiley, (*id.*, 92,) was filed to remove from their respective titles the clouds caused by the patents of Johnson and Samson respectively; and this court granted the relief in both cases, thus overruling the decisions of the secretary under which those patents had issued. Towsley sued on his patent, but Samson's title was merely equitable. Towsley's case is reviewed and sustained in Rector *v.* Gibbon, 111 U. S., 276, *290*. It is likely, in view of s. 10 of the act of 12 June, 1858, that the act of 25 February, 1869, in Craig's case, would have declared that the decisions of the register and receiver, on the derivative claims, should be final, had congress intended them to be final; but even then, it is clear from Johnson *v.* Towsley and Samson *v.* Smiley, that such finality would not have precluded equity from granting the relief sought in Leitensdorfer's supplemental bill. It may also be inferred, from those cases that, as the general system of equity gave relief in them against decisions expressly declared by statute to be final, so, in the present controversy, the general system of land law gives relief by appeal to the commissioner and secretary, successively, from the decisions of the register and receiver, especially since the statute of 1869 does not expressly declare them to be final. For this court, in Johnson *v.* Towsley referring to s. 10 of the act of 12 June, 1858, said:

"But the section under consideration is only one of several enactments concerning the relative duties, power, and authority of the executive departments over the subject of the disposition of the public lands, and a brief reference to some of them will, we think, show what was intended by this amendment." (13 Wall., 82.) The court then cites the act of 4 July, 1836, s. 1, 5 stat., 107, (printed in appendix to this brief, No. 1,) and the case of Barnard *v.* Ashley, 18 Howard, 43. So, in Craig's case, a brief reference to the act of 4 July, 1836, s. 1, as construed in Barnard *v.* Ashley, and to other acts in *pari materia*, will, we think, show what was intended by the act of 25 February, 1869.

To prop up the conclusiveness of the decision of Stanton and Cook for Craig, he relies, upon p. 45 of his brief, on Butterworth *v.* Hoe, 112 U. S., 50. That was a case of patent for an invention. In such patents the application is first decided by the "primary examiner." (R. S., § 4904, 4909.) If he rejects it twice an appeal

lies "to the board of examiners-in-chief." (*Id.*) From their decision an appeal lies to the commissioner of patents; (*Id.*, § 410;) and from his decision an appeal lies to the supreme court of the district of Columbia in banc, (*id.*, § 4911,) whose decision "shall govern the further proceedings in the case." (*Id.*, § 4914.) And in all cases where a patent is due *the commissioner issues it.* (*Id.*, § 4915, 4893.) In Butterworth *v.* Hoe, the court held that these specific provisions preclude the secretary of the interior from entertaining appeals from the commissioner of patents in virtue of the secretary's *general* powers of supervision as conferred by R. S., § 441, 481, 483, 487 and 4883. That sturdy old Welsh royalist, David Jenkins, had decided the case, in his prison, 250 years ago, in four words:—*generalia specialibus non derogant.* (Jenk. Cent., 120.)—The general provisions vesting the secretary with supervisory power, could not derogate from the special provisions vesting the supreme court of the district of Columbia with the appellate power. But those special provisions derogate from the general provisions, for *generalibus specialia derogant.* (Halkerston's Max., 51.) And so, here, the general provision in the act of 25 February, 1869, vesting the register and receiver with power to hear these derivative claims, could not derogate from the special provisions in the act of 4 July, 1836, s. 1, and in R. S., § 453, vesting the commissioner with his supervisory and controlling power. "General words subsequent shall be restrained by precedent particular words." (14 Vin. Abr., 61; Branch's Pr.)

Craig concludes the 8th point of his brief, on p. 46, with the proposition that, if the act of 4 July, 1836, s. 1, (5 stat., 107,) gave Leitensdorfer an appeal to the commissioner, "then the whole matter by the statute was under the supervision of the President of the United States;" and the brief suggests that, if the president's supervisory power was taken away by the revised statutes, still Craig's accrued right to invoke the president's supervision was saved by R. S., § 5597. To support this alleged power of the president, Craig quotes Johnson *v.* Towsley, 13 Wall., 72, where the court, quoting from the act of 4 July, 1836, s. 1, said:—"it is obvious that the direct control of the President was contemplated whenever it might be invoked." (13 Wall., 82.) The act of 1836 had declared that the executive duties contemplated by it "shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States;" and the court, in Johnson *v.* Towsley, perhaps meant that the president's direction must be invoked *by the commissioner* when, in cases of doubt, he might feel the necessity of such direction; for the commissioner had no right to invoke the opinion of the attorney general, that right being limited to the president and the heads of departments; (act 24 Sep., 1789, s. 35, 1 stat., 73, *93;* R. S., § 354, 356;) and the term *direction,* in

the act of 1836, could not, without the aid of long executive usage, be wrested to mean the hearing and determining of contests by the president.

But the words of the court, on this point, in Johnson *v.* Towsley, are a mere *dictum*. The direct control of the president had not been invoked there. The question was, not the power of the president to review the secretary's final decision, but the power of a court of equity to do so. Besides, since the decision in Johnson *v.* Towsley, the provision in the act of 1836, cited by the court, has been much more elaborately considered, and the doctrine of this court now is, that the act intended the direction by the president to be exercised through the head of the department and not by personal interference. (Snyder *v.* Sickles, 98 U. S., 203, 210–211.) Before approving the act of 4 July, 1836, president Jackson referred this question to the attorney general, who, on that day, rendered the opinion that the bill, if approved by the president, would still leave the general land office, as before, *subject to the general superintendence of the president through the head of the department*. (3 Opinions, 137.) The president then approved the bill, and, on the same day, issued his written directions to the secretary of the treasury, then the head of the land department, enforcing the opinion of the attorney general. (Pub. Lands. Laws, Opinions and Instructions, Part II, p. 104.) See also the opinions of presidents Pierce and Buchanan, 1 Land Laws, Regulations and Decisions, Lester, 508, 680, and opinion of justice Field in Patterson *v.* Tatum, 3 Sawyer, C. C., 164, cited Spaulding on Pub. L., § 14.

Under the old preëmption act of 29 May, 1830, s. 3, (4 stat., 420,) there was no appeal to the commissioner from the decisions of the register and receiver. (3 Opinions, 93, 104, 126.) But the act of 4 July, 1836, s. 1, gave the commissioner supervision of such cases, under the direction of the president. (Barnard *v.* Ashley, 18 How., 43, *45*.) After that, the general preëmption act of 4 September, 1841, § 11, (5 stat., 453,) took away the commissioner's supervisory power and vested it temporarily in the secretary of the treasury, "and *so far as the act of 1836 associated the president with the commissioner, superseded his supervisory functions also.*" (Johnson *v.* Towsley, 13 Wall., 83.) If this be so, it follows, even from the case of Johnson *v.* Towsley, that the act of 3 March, 1849, s. 3, (9 stat., 395, and printed in appendix to this brief, No. 2,) which, without referring to the president, gave the secretary of the interior, whose department it created, the permanent supervision of the commissioner, in all cases, took away all possible supervisory power of the president in such cases. But the act of 3 March, 1849, is now superseded by R. S., § 441, 453, 2478, which still substitute the direction of the secretary for that of the president, and have thus repealed, also, the act of 4 July, 1836, s. 1.

(See R. S., § 5596.) The adoption of the revised statutes on the 22 June, 1874, antedates Craig's appeal to the secretary which was taken on or after the 1 October, 1874; (Transc.. 397–8;) so that any directing power that the president could ever possibly have had in Craig's case, under the act of 1836, ceased before he appealed to the president. That act having been repealed on the 22 June, 1874, the *dictum* in Johnson *v.* Towsley, which was decided before the repeal, has ceased to be important. As to Craig's suggestion, on p. 46 of his brief, that his accrued right to invoke the president's direction was saved by R. S., § 5597, it is enough to say that no such right ever existed, and that his application to the president was not yet pending when the act of 1836 was repealed on the 22 June, 1874.

Indeed, if Johnson *v.* Towsley be right, the president's power to direct the commissioner generally, admitting it to have once existed, must have been transferred to the secretary by act of 3 March, 1849, s. 3. The mere fact that no president ever before assumed appellate jurisdiction in any land case, is powerful evidence that no such jurisdiction existed or exists, but that, in the language of rule 113 of the code of practice prescribed by the secretary in land cases, "The decisio n of the secretary, so far as respects the action of the Executive, is final." (7 Copp's Land Owner, 174; Spaulding on Pub. Lands, § 537, p. 306.) That code proceeds on the hypothesis that appeals lie from the register and receiver to the commissioner and from him to the secretary, in every case, with trifling exceptions not applicable here.—"Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)" See rule 43, XII Copp's Land Owner, 155; Spauld. on Pub. Lands, p. 298 And "An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions, and orders for hearing or other matter resting in the discretion of the Commissioner," &c.; (Rule 81, XII Copp's L. O., 156; Spaulding, p. 303;) for even under the act of 3 March, 1849, s. 3, "The jurisdiction to revise on appeal was necessarily co-extensive with the powers to adjudge by the Commissioner." (Magwire *v.* Tyler, 1 Black, 195, *202.*)

On p. 47 of Craig's brief, he defends Stanton and Cook against complainant's charge of fraud. For a review of the evidence on which this charge is founded, and for the argument sustaining the charge, the court is referred to our brief of 9 Oct., 1886, for complainant, p. 62 and *seq.*

## Reply to Appellant's Ninth Point.

Craig says on p. 50 of his brief, as his ninth point, that, as this suit is brought to cancel a U. S. land title, it should have been brought in the name of the United States. But that is only necessary where, as in Mullan *v.* U. S., (118 U. S., 271, *276*,) "if the title is vacated the lands will be restored to the public domain." Leitensdorfer's right to sue in his own name is sustained on p. 25 and *seq.* of our brief of 9 Oct., 1886. But it is too late to raise an objection, in this court, to Leitensdorfer's capacity, after tacitly waiving the objection in the lower court. Non-joinder "must be taken advantage of before the final hearing." (Bouv. Dict., "Non-Joinder.)" Johnson *v.* Towsley, (13 Wall., 72,) was a bill for the surrender of Johnson's junior U. S. patent on the ground that it had issued illegally for the ½ quarter section covered by Towsley's senior settlement and U. S. patent and was a cloud on the senior title; (*id.*, p. 76;) and this court granted the relief, as it did also in Samson *v.* Smiley, (*id.*, p. 91,) which differed in no respect from Johnson *v.* Towsley, save "that when the register and receiver decided in favor of Smiley against Samson, in the contest for the right of preëmption to the land, they did not give him a patent certificate as they did to Towsley." (*Id*, p. 92.) Yet in neither of these cases was the objection dreamed of that the U. S. must sue to get rid of its own patent. Neither bill was technically a bill to cancel; but Towsley's bill, as sustained by this court, was equivalent to that, for, it set up a legal patent of Towsley to a ½ quarter section against the junior illegal settlement and patent of Johnson for the same tract, so that it was impossible to sustain the bill save on the ground that the junior conflicting settlement and patent were void. The legality of the senior settlement and patent necessarily involved the nullity of the junior conflicting settlement and patent; for the U. S., after lawfully conveying the land by patent to Towsley, had no residuum of title left to convey to Johnson.

So in Van Wyck *v.* Knevals, (106 U. S., 360,) where the land department issued a patent to Van Wyck extrinsically invalid, and then refused one on the conflicting grant under which Knevals claimed, the latter filed his bill against Van Wyck in the U. S. circuit court for the Nebraska district, alleging that Van Wyck's patent was a cloud on complainant's title. There was a decree for complainant, ordering a conveyance to him of the legal title. Van Wyck appealed. This court, through justice Field, affirmed the decree, saying—"The existence of the patent, therefore, embarrasses the assertion of the complainant's rights; that is, it prevents him from obtaining a strictly legal title which would enable him to recover possession of the premises by an action at law. *The existence of the patent also creates a cloud upon the title of*

*the land. Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it require extrinsic evidence to show its invalidity. Pixley v. Huggins,* 15 Cal. 128." (106 U. S., 370.) In Van Wyck *v.* Knevals as in Johnson *v.* Towsley, it is plain that this court, at the suit of a citizen, without questioning his capacity, held the U. S. patent of the defendant below to be void; for the court says "that when the defendant made his entry of the lands in controversy, and obtained a patent therefor, the title had passed from the United States, *and consequently no right could be conferred upon him;*" and for the same reason the court adds, with the acumen which marks all of justice Field's decisions, that, instead of a conveyance of the premises to the complainant, Knevals, the relief "should properly be limited to a decree declaring the equity of the complainant, the invalidity of the title of the defendant, and enjoining him from the assertion of any claim to the property under the patent." (*Id.*)

## Reply to Appellant's Tenth Point.

The 10th point in appellant's brief, p. 58, is that the decree below is erroneous because it cancels the evidence of his title to all the land awarded him by Stanton and Cook, though not more than 8,000 acres could possible enure to complainant.

Complainant filed his derivative claim before Stanton and Cook for certain divisions and subdivisions amounting to 25 sections or 16,000 acres. (Transc., 284.) We have shown, on p. 39 of our brief of 9 Oct., 1886, that "the matter in dispute," in this suit, is Craig's title, not complainant's, and that, were it otherwise, complainant retained, when this suit was filed, enough land to give jurisdiction to the court below. Such being the case, it is not material to inquire what conveyances complainant may have made after filing his claim before Stanton and Cook; for the proceedings before the executive and judicial departments must continue in Thomas Leitensdorfer's name, for the benefit of whom it may concern. See the order of this court of 7 January, 1884, denying the motion of Mrs. Leann S. King, as the purchaser of Thomas Leitensdorfer's claim, to intervene in this case or to be substituted for him; and the secretary's decision of 15 September, 1884, denying her motion to intervene, or be substituted, in the general land office. (3 Decisions of Int. Dept. relating to Pub. Lands, 110; and see 2 *id.*, 378.) Any decree of this court or decision of the executive, in Thomas Leitensdorfer's favor, will at once enure to all those holding title under him. See p. 35 of our brief of 9 October, 1886.

Leitensdorfer's supplemental bill attacked the whole title of Craig, as a unit, on the ground that Craig obtained the decision

of Stanton and Cook by corruption; and on the independent ground that the decision was appealable, that complainant had appealed from it, and that Craig's evidence of title had issued illegally, pending that appeal. If either of these grounds be tenable, Craig's title is illegal for every acre embraced in it. His title is indivisible. It is all good or all bad. These reasons are also a

### Reply to Appellant's Eleventh Point

which avers that the decree below is erroneous because it cancels the title to the whole amount awarded Craig by Stanton and Cook, though the record shows that Craig holds title to a large part of it under unquestioned deeds from complainant's immediate grantors made before any conveyances to complainant. (See brief for Craig, p. 59.)

### Reply to Appellant's Twelfth Point.

Point twelve in the brief for appellant, p. 60, holds the decree below to be erroneous because it cancels Craig's evidence of title to all the land awarded him by Stanton and Cook, without inquiring the quantity which it would be possible for complainant to maintain title to, the record showing numerous conveyances from him and his grantors absorbing nearly, if not quite, $\frac{1}{6}$ of the land confirmed.

Thomas Leitensdorfer, being, in the words of the act of 25 February, 1869, s. 1, in the category of "actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives," could maintain this suit to cancel Craig's title, as an illegal cloud on his own, if the sole property of complainant was his actual settlement; for the act of 1869, like all homestead acts, looks only to the *bona fides* of the settler, and to the fact and right of settlement, without regard to the extent or value of the land settled upon; and we have shown, on p. 39 of our brief of 9 October, 1886, that "the matter in dispute" now is simply Craig's title. But, if complainant's claim be the matter in dispute, we have shown, on the same page, that the interest in the claim, remaining to complainant when he filed this suit, was much more than $500. The value of his improvements, exclusive of his land, is $1,000. (Transc., 433.)

Craig's brief, p. 60, deducts from complainant's claim "three miles of the *Huerfano* Valley, say, 2000 acres." But Craig shows under his XI. point, that these alleged 2000 acres are in Craig's claim. They are therefore no part of Thomas Leitensdorfer's

claim, and never were. The quantity is not 2000 acres, for, by Craig's deed to Lewelling, (Transc., 442,) one mile of a larger valley, that of the Las Animas, is but 230 acres. So that 3 miles of the Huerfano valley would probably not exceed 690 acres. But, whatever it may be, it must be debited against Eugene Leitensdorfer's original $\frac{1}{6}$ interest in the grant, and not against his brother's located 16,000 acre settlement claim in the remote *Las Animas* valley. There are other errors in Craig's computation, on p. 60 and 61 of his brief, respecting the interest subsisting in complainant when he filed his bill; but they have already been anticipated and refuted under point IV on p. 32 of our brief of 9 October, 1886. See, too, our reply above to Craig's X. point.

## Reply to Appellant's Thirteenth Point.

Point XIII of the brief for Craig, p. 61, is this:—

"The decree is erroneous because it cancels the patent of the United States granted and issued to Craig after issue joined in this cause, and which is not mentioned in any pleading *or in the Master's report in the case*, but is only found as one of the exhibits of said Master's report."

On the 30 January, 1879, the court below referred this cause to Edward F. Bishop, one of the masters in chancery, of the court, to take proof in the cause. (Transc., 114.) On the 3 February, 1879, complainant's counsel caused formal notice to be served personally at Denver, Colorado, on G. G. Symes, attorney of record for Craig, (Transc., 24, 25,) that, on the 8 February, 1879, they would take testimony and file copies, &c., on behalf of complainant, at Denver, before the master. (*Id.*, 117.) Accordingly, at the time and place mentioned in the notice, the master, according to his report, as filed on the 26 February, 1879, (*id.*, 114,) "was attended by J. Q. A. King, Esq., solicitor of the said complainant, who introduced certain instruments of writing in evidence, said instruments of writing being marked by me A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A', and B', and accompanying and made a part of this my report." (*Id.*, 115.) The document Y, thus referred to by the master, was a transcript of Craig's title, as certified by the acting commissioner of the general land office. (*Id.*, 194.) Part of that title, and of instrument Y, is the patent for Craig's claim, (Transc., 228,) dated the 8 January, 1878, (after the demurrers of the surveyor general and Craig to the supplemental bill, *id.*, 52–3,) and delivered personally to Craig, in Washington, by the general land office, on the 11 January, 1878. (*Id.*, 228.)

The patent, thus filed in court on the 26 February, 1879, was properly before the court when annulled by the final decree of

2 July, 1880. The court doubtless considered that, as the patent was obtained by Craig *pendente lite*, its cancellation was "agreeable to equity and good conscience," and was therefore within Leitensdorfer's prayer for general relief. (Transc., 50.) The president's order of 2 March, 1877, is the preamble to the patent, (Transc., 229,) and the instrument recites the decision of the register and receiver for Craig, (*id.*, 230–231 *et seq.*,) and incorporates the approved plat. (*Id.*, 234.) If that order, decision and plat were illegal, as charged in complainant's supplemental bill, the patent, which is wholly founded on them, is illegal in consequence. It is impossible to sustain the charges of complainant against those foundations of the patent, without annulling the patent. *Debile fundamentum fallit opus.* The patent simply enforced the decision of Stanton and Cook, the fiat of the president, and the approved plat, and added nothing to the strength of Craig's title. It issued in alleged "conformity with section two thousand four hundred and forty-seven of the Revised Statutes of the United States," (Transc., 234,) which provides that where a land claim had been confirmed by law, and the confirmatory statute had made no provision for the issue of a patent, one may issue "upon the presentation to the Commissioner of the General Land-Office of plats of survey thereof, duly approved by the surveyor-general of any State or Territory, if the same be found correct by the Commissioner." But the section declares that "such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land." (R. S., § 2447.)

Craig having obtained personal delivery of this patent to himself on the 11 January, 1878, should have set it up in his answer, which was filed on the 7 October, 1878. (Transc., 58.) As he did not do this, complainant's counsel rightly offered it in evidence before the master on the 8 February, 1879, that it might be decreed void by the court and that thereby a second suit might be obviated. As a *relinquishment* patent it was extrinsically void, because, among other reasons, Craig had already accepted an approved plat which, if legal, had conveyed the fee to Craig and left the government nothing to relinquish. But the patent was a cloud on complainant's claim and a trap to catch innocent purchasers from Craig, and was properly canceled. "Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it require extrinsic evidence to show its invalidity. *Pixley* v. *Huggins*, 15 Cal., 128." (Van Wyck *v.* Knevals, 106 U. S., 360, *370*, by Field, J.)

## Reply to Appellant's Fourteenth Point.

Craig ends his brief, on p. 62, with his point XIV., which holds that the decree below is erroneous because not limited to the cancellation of the evidence of his title to so much land as was vested in Craig when the decree was passed.

This point is answered on p. 71 *et seq.* of our brief of 9 October, 1886.

Complainant published the usual *lis pendens*, as will be shown, if necessary, in future proceedings; but the Colorado Code of Civil Procedure, C. 3, s. 38, p. 13, does not govern an equity case in a U. S. court. (U. S. R. S., § 913, 914; and see Coffey *v.* U. S., 117 U. S., 233.)

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On the 12 October, 1886, the death of complainant being suggested, an order was entered by this court admitting Edward J. Hubbard, his administrator, as a party defendant in this appeal. On the next day, we filed his letters and his power authorizing us to represent him, and entered our appearance accordingly. On the 12 October, 1886, the death of appellant, Craig, was also suggested to the court, and afterwards an appearance was entered for his executor, Francis Downs.

We ask that the court may affirm the decree below, with the modification suggested on p. 74 of our brief of 9 October, 1886.

ROBT. H. BRADFORD,
CHARLES W. HORNOR;
For Thomas J. Allen,
And for Edward J. Hubbard
*Admr. of Thomas Leitensdorfer.*

Washington, D. C., 1 *February*, 1887.

# APPENDIX.

## No. 1.

[Act of 4 July, 1836, V. stat., 107.]

CHAP. CCCLII.—*An Act to reorganize the General Land Office.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.

* * * * * *

SEC. 11. *And be it further enacted*, That such provisions of the act of the twenty-fifth of April, in the year one thousand eight hundred and twelve, entitled "An act for the establishment of a General Land Office in the Department of the Treasury," and of all acts amendatory thereof, as are inconsistent with the provisions of this act, be, and the same are hereby, repealed.

2 Stat., 716.

* * * * * *

APPROVED, July 4, 1836.

## No. 2.

[Act of 3 March, 1849, IX. stat , 395.]

CHAP. CVIII.—*An Act to establish the Home Department, and to provide for the Treasury Department an Assistant Secretary of the Treasury, and a Commissioner of the Customs.*

* * * * * *

SEC. 3. *And be it further enacted*, That the Secretary of the Interior shall perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury; and the said Secretary of the Interior shall sign all requisitions for the advance or payment of money out of the treasury, on estimates or accounts, approved or certi-

fied by the Commissioner of the General Land Office, subject to the same control now exercised by the First Comptroller of the Treasury.

* * * * * *

APPROVED, March 3, 1849.

[The act has no repealing clause.]

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No. 3.

[Act of 21 June, 1860, XII. stat., 71 ]

CHAP. CLXVII.—*An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen, be, and they are hereby, confirmed: *Provided*, That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. *And be it further enacted*, That in surveying the claim of said John Scol*ly* it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

SEC. 3. *And be it further enacted*, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstracts marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. *And be it further enacted*, That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

* * * * * *

APPROVED, June 21, 1860.

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No. 4.

[Act of 25 February, 1869, XV. stat., 275, 440.]

CHAP. XLVII.—*An Act to amend an Act entitled "An Act to confirm certain private Land Claims in the Territory of New Mexico."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the exterior lines of the Cornelio Vigil and Cram St. Vrain claims of eleven leagues each, subject to claims derived from said parties as confirmed by the act of Congress approved twenty-first June, eighteen hunded and sixty, United States Statutes, volume twelve, page seventy-one, shall be adjusted according to the lines of the public surveys, as nearly as practicable, with the limits of said claims, yet in as compact a form as possible; and the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives prior to the passage of this act, who may establish their claims within one year from the passage of this act, to the satisfaction of the register and receiver of the proper land district, shall in like manner be adjusted according to the subdivisional lines of survey, so as to include the lands so settled upon or purchased, and the areas of the same shall be deducted and excluded from the adjusted limits of the claims of said Vigil and St. Vrain respectively; and the claims of all other actual settlers falling within the limits of the located claims of Vigil and St. Vrain shall be adjusted to the extent which shall embrace their several settlements upon their several claims being established either as pre-emption or homesteads, according to law; and for the aggre-

gate of the areas of the latter class of claims the said Vigil and St. Vrain, or their legal representatives, shall be entitled to locate a like quantity of public lands, not mineral, according to the lines of the public surveys, and not to exceed one hundred and sixty acres in one section.

SEC. 2. *And be it further enacted*, That it shall be the duty of the general land office to cause the lines of the public surveys to be run in the regions where a proper location would place the said Vigil and St. Vrain claims, and that the expense of the same shall be paid out of any moneys in the treasury not otherwise appropriated; yet, before the confirmation of the said act of June twenty-first, eighteen hundred and sixty, shall become legally effective, the said Vigil and St. Vrain, or their legal representatives, shall pay the cost of so much of said surveys as enures to their benefit respectively, and that all settlers of the said third class, whose claims may be adjusted as valid, shall have the right to enter their improvements by a strict compliance with the pre-emption or homestead laws.

SEC. 3. *And be it further enacted*, That upon the adjustment of the Vigil and St. Vrain claims according to the provisions of this act, it shall be the duty of the surveyor general of the district to furnish proper approved plats to said claimants, or their legal representatives, and so in like manner to said derivative claimants, which shall be evidence of title, the same to be done according to such instructions as may be given by the commissioner of the general land office.

SEC. 4. *And be it further enacted*, That immediately upon running the lines as provided in section second of this act, the surveyor-general of said district shall notify the said Vigil and St. Vrain, or their agents or legal representatives, of the fact of such survey being made, and said claimants shall, within three months after notice of such survey, select and locate their said claims in accordance with such survey and the provisions of this act and of the act to which this is amendatory, so far as the same is not changed by this act, and shall within said time furnish the surveyor-general with the description of such location, specifying the lines of the same. And the party failing to make such selection and location, in such manner and within such time, shall be deemed and held to have abandoned their claim, and their rights and equities under this act, and the act to which this is amendatory, shall cease and terminate.

SEC. 5. *And be it further enacted*, That in case of the neglect or refusal of the said Vigil and St. Vrain, or either of them, to accept of the provisions of this act, and the act to which this is amendatory, and to locate their said claims, as p ovided therein, no suit shall be brought or proceedings instituted in any of the courts of the United States, by such party or by any one claiming

through or under them, to establish or enforce said claims, or for any cause of action founded upon the same, after six months from the passage of this act.

APPROVED, February 25, 1869.

[The time fixed by s. 1 of the above act for establishing the derivative claims, was extended by the joint resolution below.—]

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No. 5.

[Joint res. of 28 April, 1870, XVI. stat., 373, 663.]

[No. 38.] *Joint Resolution to construe an Act entitled "An Act to amend an Act entitled 'An Act to confirm certain private Land Claims in the Territory of New Mexico.'"*

*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of an act approved February twenty-fifth, eighteen hundred and sixty-nine, and entitled "An act to amend an act entitled 'An act to confirm certain private land claims in the Territory of New Mexico,'" as requires that derivative claimants under Vigil and St. Vrain shall establish their claims to the satisfaction of the register and receiver of the proper land district within one year from the passage of said act, shall be so construed as to authorize the presentation of such derivative claims within one year from the completion and approval of the subdivisional surveys contemplated by said act of twenty-fifth February, eighteen hundred and sixty-nine.

SEC. 2. *And be it further resolved,* That all settlers entitled by said act to the rights of pre-emption or homestead shall have the further time of thirty days, after notice in favor of their respective claims, to file their declaratory statements as pre-emptors or to make entry under the homestead laws, as they may select.

APPROVED, April 28, 1870.

No. 6.

[Revised Statutes of the United States, ed. of 1878.]

SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

First. The census; when directed by law.
Second. The public lands, including mines.
Third. The Indians.
Fourth. Pensions and bounty-lands.
Fifth. Patents for inventions.
Sixth. The custody and distribution of publications.
Seventh. Education.
Eighth. Government Hospital for the Insane.
Ninth. Columbia Asylum for the Deaf and Dumb.

* * * * * *

SEC. 453. The Commissioner of the General Land-Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all [*agents*] [grants] of land under the authority of the Government.

* * * * * *

SEC. 2478. The Commissioner of the General Land-Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

[The title meant by this section is "TITLE XXXII. THE PUBLIC LANDS."—See R. S., p. 388, ed. of 1878.]

25-184

FILED
OCT 12 1887
JAMES H. McKENNEY
CLERK

# Supreme Court of the United States.

OCTOBER TERM 1887.

No. 1.

WILLIAM CRAIG'S EXECUTOR, Appellant,

*vs.*

THOMAS LEITENSDORFER'S ADMINISTRATOR, Appellee.

**THOMAS ALLEN and LEANN S. KING, Intervenors.**

## BRIEF IN BEHALF OF LEANN S. KING.

JOHN PAUL JONES,
F. P. DEWEES,
D. W. VOORHEES, of Counsel,
*For Leann S. King.*

BENJ. F. BUTLER,
O. D. BARRETT,
*For Appellant.*

ROBERT H. BRADFORD,
CHARLES W. HORNER,
*For Appellee.*

*Press of Thomas McGill & Co., Washington, D.C.*

IN THE

# Supreme Court of the United States.

**October Term 1887.—No. 1.**

WILLIAM CRAIG'S EXECUTOR, APPELLANT,

*vs.*

THOMAS LEITENSDORFER'S ADMINISTRATOR, APPELLEE.

JAMES ALLEN AND LEANN S. KING, ADMINISTRATRIX, INTERVENORS.

## LEANN S. KING'S STATEMENT.

Thomas Leitensdorfer claimed about 16,000 acres of land, part of what is known as the Las Animas grant, now situate in the State of Colorado.

After the present appeal was taken to this Court, the 16,000 acres above referred to were purchased at a sheriff's sale by Leann S. King, and conveyed to her by deed from the sheriff of Las Animas county, Colorado, a copy of which deed is printed in the Appendix to this brief.

On the 7th day of January, 1884, (erroneously stated as 1883 in appellant's brief,) Mrs. King, as the owner of Thomas Leitensdorfer's former interest in said land, asked this Court to be substituted as appellee in this Court, or to be permitted to intervene.

An order was made by the Court denying said motion, with leave to file a brief on final hearing, and to be heard on any motions affecting her interests.

Mrs. King claims that so far as the decree in the Court below is decisive of anything in favor of Thomas Leitensdorfer's administrator, such decree enures to her benefit.

She therefore asks that the decree of the Court below be affirmed and that her rights in the premises be recognized. The reasons for affirming the decree of the Court below are presented in the able and exhaustive briefs of counsel for Thomas Leitensdorfer's administrator, on file in this case; but, in addition thereto we beg to submit, on behalf of Mrs. King, the following statement and brief of argument.

STATEMENT.

Demurrer was filed by the defendants, Campbell and Craig, to the supplemental and amended bill. (Bill, R. 32, Demurrer, pp. 52 and 54). The demurrer was sustained as to Campbell, the Surveyor-General of Colorado, and overruled as to William Craig, appellant's intestate.

The opinion was rendered by Dillon, C. J.—Hallett, D. J., concurring.

A synopsis of the material facts as presented by the said supplemental and amended bill is contained by the opinion of the Court, as follows:

"1. December 9th, 1843, Manuel Armijo, Governor of New Mexico, granted to Cornelio Vigil and Ciril St. Vrain certain lands (922 square leagues—4,096,345 acres) then in New Mexico, now in Colorado."

"2. March 7th, 1844, Vigil and St. Vrain conveyed one-sixth (undivided) of the same lands to Eugene Leitensdorfer."

"3. In the same year (1844) Vigil and St. Vrain conveyed a one-sixth (undivided) interest to Bent, Doniciano Vigil, and Armijo, each, making, in all, four interests of one-sixth each so conveyed."

"4. December 10, 1861, Eugene Leitensdorfer conveyed his one-sixth interest to Thomas Leitensdorfer, the complainant's intestate."

"5. June 21, 1860, Congress confirmed the grant to the

extent of eleven leagues for each of the claimants, Vigil and St. Vrain, (97,650$\frac{96}{100}$ acres in all,) saving the rights of those who had acquired title from them." (12 Stats. L., 71.)

"6. February 26, 1869, Congress amended the act of 1860, and provided that all claimants (the original grantees and those who held title under them) 'should establish their claims to the satisfaction of the register and receiver of the proper land districts,' &c." (15 Stats. L., 275.)

"7. That thirty-nine claims were presented to the register and receiver under the act, and among them plaintiff's claim for 16,000 acres and Craig's claim for 127,000 acres."

"8. Of these claims, plaintiff's and defendant Craig's were not for the same tract, but for separate parcels of the original grant."

"9. That plaintiff's claim before the register and receiver was well supported by evidence showing the conveyance to him by Vigil and St. Vrain, and occupancy and improvement of the tract by plaintiff and his grantees."

"10. That defendant, Craig's, claim is junior to plaintiff's, and is founded on a deed from St. Vrain alone, executed long after plaintiff's deed was made; that Craig has no title whatever from Vigil, and if his deed from St. Vrain is good, the prior grants of Vigil and St. Vrain, of which plaintiff is the first, will absorb all the twenty-two leagues confirmed by Congress, and leave nothing for Craig."

"11. That notwithstanding plaintiff's manifest right, the register and receiver illegally, fraudulently, and corruptly allowed Craig's claim to the extent of 73,251$\frac{55}{100}$ acres, and disallowed plaintiff's claim altogether."

"12. That the consideration for the corrupt agreement between the register and receiver and Craig was the conveyance of a portion of the tract allowed the latter to one Golding for the use and benefit of the register and receiver."

"13. That plaintiff appealed from the decision of the register and receiver, (5 Stats. L., 107,) but was defeated, in not having the appeal heard and by the President directing the Commissioner of the General Land Office to issue the plat to Craig. The appeal was never heard, and the

Commissioner of the General Land Office refused to hear it."

"14. That the plat has, accordingly, been issued to Craig. The statute makes the plat evidence of the title." (15 Stats. L., sec. 3, p. 227.)

"The plaintiff, in his bill, says nothing about other derivative claimants, whose claims were wholly or partially allowed. He does not allege that any of these claimants obtained more or less than they were entitled to. He does not state in his bill 'that the questions arising in this action are of great and general interest to all of said derivative claimants,' and that it is inconvenient or impossible to bring them before this Court."

"No relief is sought in the bill against the other derivative claimants. The only defendants to the bill are Craig and Campbell, the Surveyor-General of Colorado."

"The prayer of the bill is that the approved plats of the derivative claims of Craig, signed by defendant Campbell, be decreed void from beginning, and canceled, or that Craig be decreed to hold the land in trust for plaintiff and the other derivative claimants, and for all other general and special relief applicable to the case." (5 Dillon, C. C., 419.)

Before the final decree was made by the District Court of Colorado, the General Land Office issued patents for the lands described in Craig's approved plats. (Rec., p. 229.)

The facts of the case, as stated by Judge Dillon, are substantially proven, as shown by the Record.

IT IS BEYOND CONTROVERSY;

That Manuel Armijo, Governor of New Mexico, granted what is known as the Las Animas tract, now in Colorado, to Vigil and St. Vrain; that on the 4th of March, 1844, Vigil and St. Vrain conveyed one-sixth undivided interest to Eugene Leitensdorfer; that in 1844 three other undivided sixth interests were conveyed by Vigil and St. Vrain to three other parties; that Eugene Leitensdorfer, in 1861, conveyed to Thomas Leitensdorfer; that Leitensdorfer

presented his claim to the register and receiver for 16,000 acres, and Craig for 127,000 acres; that these claims were for different tracts; that Leitensdorfer's claim before the register and receiver was well supported by evidence showing the conveyance to him by Vigil and St. Vrain, and of the occupancy and improvement of the tract since 1861; that Craig's claim is junior to Leitensdorfer's and founded on a deed from St. Vrain alone, executed long after Leitensdorfer's deed was made, and that Craig had no title from Vigil. The only material question of fact disputed is that of

FRAUD AND BRIBERY.

It is alleged in the bill of complaint that the Register and Receiver, illegally, fraudulently, and corruptly allowed Craig's claim to the extent of 73,251.55-100ths acres, and disallowed Leitensdorfer's claim altogether, and that the consideration for the corrupt agreement between the register and receiver and Craig, was the conveyance of a portion of the tract to the latter for the use and benefit of the register and receiver.

Craig, in his answer, denies "that he corruptly or in any way influenced this said decision by conveying for their use and benefit to one Golding about 22,000 acres of the land embraced in the said decision for the nominal consideration of $30,000, and denies that he ever, at any time or in any way, deeded or conveyed any lands or property of any kind, or gave or paid any consideration of any kind, or promised any land or property of any kind, directly or indirectly, to said register or receiver, or to any person whatsoever, for their use or benefit, to influence their decision or action in the matter of deciding on said derivative claim, or in any other matter connected therewith."

This portion of the answer to complainant's bill is skillfully drawn, but it will be observed that such answer does not deny that he conveyed about 22,000 acres to Golding for

the use and benefit of the register and receiver. It simply denies that he corruptly or in any way influenced their *decision* by such conveyance.

The answer does not deny that he conveyed property or paid a consideration, or promised land or property, to said register and receiver, or to any one, for their use and benefit. It denies that it was "to influence their decision or action," &c.

The facts bearing upon the question of fraud are not in serious dispute. (See appellant's brief, p. 47 *et. seq.*, and appellee's brief, p. 62 *et. seq.*, with references to record.) It is contended by the appellee, in his brief, and is so held by the Court below, that the action of the register and receiver in deciding in favor of Craig was fraudulent. In the brief for appellant, whilst the facts upon which the assumption of fraud is based are admitted, it is contended that such facts are not legal evidence of bribery.

To constitute such actual fraud as will be sufficient to cancel the plats and patents to Craig, it is only necessary to show that there was collusion and design between him and the register and receiver to injure Leitensdorfer by depriving him of some right or otherwise impairing it. (Conard *v.* Nicoll, 4 Pet., 291; U. S. *v.* Arredondo, 6 Pet., 691.)

As a rule, it is almost impossible to establish fraud of this character by direct evidence. From its nature, it is secret not only in inception but in its execution. It must be fully established, but in doing so the strict rules generally applicable to the admission of evidence are relaxed. Fraud may be inferred from circumstances, either one of which is not only explainable as consistent with honest purpose, but which by itself would not tend to show other than such purpose, but which, taken together, would lead to an irresistible conclusion of corruption.

Craig's answer, as heretofore shown, is not the direct denial of the charge in complainant's bill, as claimed in appellant's brief; it evades the question. But even if the

answer were positive in its terms, the fraud may be shown by circumstances.

The method of bribery adopted in this case, as shown by the record, was the usual and common one, where no especial delicacy is required in the negotiation.

During the pendency of these claims before Stanton and Cook, the existence of a corrupt ring in the Pueblo land district, Colorado, and that Stanton and Cook, the register and receiver, belonged to it, is shown by the record. (Commissioner's Reports, Rec. 187 and 189, and Exhibits "A" and "B," p. 99.)

It is to be assumed that Stanton and Cook were to be taken in the ring, for the reason that by ringsters they would be recognized as proper parties to whom the execution of fraudulent schemes might be entrusted.

Cook, when receiver, was notoriously insolvent and dissolute (Mays' tes., Rec., p. 92); he was reported to be supported, in part, at any rate, by a woman of the town.

That Stanton and Cook were approachable for dishonest purposes, is evident; that they were approached through Golding, an insolvent retail liquor dealer, would seem to be without question. Craig, without consideration, conveys a portion of the land in controversy to Golding; Golding, without consideration, conveys a portion of the land in question to Moffitt, in trust, to secure Cook's debt to the bank of which Moffitt was cashier, and also for the purpose of raising money for Cook.

Stanton, for a mere nominal consideration, received a quit-claim deed from Moffitt, with the approval and consent of Golding.

Part of the conveyances for the benefit of Cook and Stanton were made prior to the 23d of February, 1874, when they made their decisions in the cases of Craig and Lietensdorfer, and part after they made such decisions.

It appears from the evidence that the part of Craig's claim traced to Stanton and Cook amounts to 18,070 acres.

It also appears that no money consideration was given by them for such land; and it is a well-settled rule that where there is an appearance of fraud, inadequacy of price becomes a strong argument against the purchaser. (Weitzell *v.* Fry, 4 Dall., 218, Sup. Ct., Pa.)

Under all the circumstances, these conveyances, so made, lead irresistibly to the conclusion that the register and receiver were bribed, if not directly, indirectly, by Craig.

Such conclusion can only be reversed by proof of an honest purpose in making the conveyances. But no legitimate or honest purpose is attempted to be shown; no such suggestion is even made, and no explanation is offered. We do not quote at length, because done so by others, but simply refer to appellee's brief, p. 62 *et seq.*, as above.

The allegations in the bill as to the corrupt agreement between Craig and the register and receiver, it is submitted, are sustained by the evidence.

It is admitted that Leitensdorfer appealed from the decision of the register and receiver, but was defeated in having the appeal heard by the President directing the Commissioner of the General Land Office to issue the plat to Craig; that the appeal was never heard, and that the Commissioner of the General Land Office refused to hear it. It is also admitted that the plat issued to Craig, and that the statutes make the plat evidence of the title.

Except that the patent was issued to Craig subsequent to the filing of complainant's bill, the facts as admitted are substantially the same as those before the Court below at the time the decree was made, from which an appeal has been taken to this Court.

### Opinion of Judge Dillon.

The opinion rendered by Dillon, C. J. (5 Dillon, 422), upon argument of the demurrer, is therefore presented in support of the decree rendered at the final hearing. It is held in such opinion—

"That the complainant had the right of appeal from the decision of the register and receiver in rejecting his claim; and also from their decision establishing the claim of Craig, so far as the latter would interfere with the rights of complainant as they might be finally established."

"That the 'approved plat is equivalent in legal effect to an ordinary patent as evidence of title.'"

"While these approved plats remain in force it is out of the power of the Commissioner of the Land Office or the Secretary of the Interior to hear and determine the appeals, for, if they should decide for the plaintiff and also against the defendant, their decisions would be without legal effect or value, since the title as respects the land awarded to Craig passed from the Government to him. Although the specific land claimed by plaintiff does not conflict on the ground with that claimed by Craig, since the tracts are many miles apart, yet the issue of 'approved plats' to Craig does injure the plaintiff, on the facts as stated in the bill of complaint; the issue of 'approved plats' does injure the plaintiff, assuming that he is entitled or shall be found entitled to the 16,000 acres of land claimed by him."

"The amount of land claimed by all the derivative claimants greatly exceeded the whole area confirmed. There is not enough for all, and the reasonable inference would seem to be that Congress intended to place *bona-fide* derivative claimants having actual settlement on an equal footing, irrespective of the date of their several titles or promises to settle, and that the extent to which they should be entitled to receive lands (not exceeding in the aggregate the amount of the confirmed area) should be decided by the Land Department of the Government."

"The rights of the claimants must be determined by the Executive Department, and not by the Courts, and the Courts can only interfere, if at all, in the results of Executive action when such results have been procured by fraud and corruption, or possibly, by a denial of some plain legal right."

"It is alleged in the bill that Craig corruptly influenced the decision of the register and receiver in his favor, by conveying to a third person, for their use and benefit, 22,500 acres of the land embraced in their decision. If this is true, a decision thus procured cannot be the basis of any rights which can injuriously affect the plaintiff, and

approved plats of title to land upon such a decision have no validity as respects any person injured thereby, and who seeks to avoid them by judicial action."

In support of this view is cited Johnson *v.* Towsley, 13 Wall., 872; Moore *v.* Robbins, 96 U. S., 530; Shepley *v.* Cowan, 91 U. S., 330.)

"We concur in holding that the bill as amended may be sustained, on the ground that it is alleged that the decision of the register and receiver was procured by the defendant by fraud; that the title of defendant rests on that decision; and that, in consequence of it and the issue of the plats, the Executive Department has disabled itself from hearing the appeals and discharging the duties imposed upon it by law."

DECREE.

The decree rendered upon the merits recites—(Rec., p. 471):

1. The decision or award of the register and receiver of the lands described in the bill and proceedings of the date of February 23, 1874, in favor of William Craig, to be fraudulent and void.

2. That the patent for the lands issued to William Craig on the 8th of January, 1878, is null and void.

3. That the approved plat or plats delivered to the defendant, William Craig, as evidence of title of the land described in the bill by William Campbell, Surveyor-General, are null and void.

The decree is in conformity with the said opinion of Dillon, C. J. If the decision of the register and receiver, procured by corrupt influence, "cannot be the basis of any rights which can injuriously affect the plaintiff," the reason, therefore, is, that the result thereof is void.

The first inquiry, therefore, before the Court below was as to whether such decision had been corruptly procured and the Court so held.

IT IS CLAIMED ON THE PART OF MRS. S. LEANN KING—

1. If the register and receiver were corruptly influenced in their decision or award by Craig, their decision in his favor cannot be the basis of any rights which can injuriously affect her interests.

2. That "the claimant had the right of appeal from the decision of the register and receiver in rejecting his claim, and also from the decision establishing the claim of Craig," and the plats or plat issued during the pendency of the appeal, independent of any question of fraud, could be decreed by the Court null and void.

3. Even though no appeal lies from the register and receiver to the Commissioner of the General Land Office, if they have erred in the construction of the law applicable to the case, or have, by mistake of law, given to Craig certain land, thereby unlawfully depriving claimant of title to his lands, or preventing him from asserting it, such decision is, nevertheless, subject to review by a Court of Equity.

4. That the order of the President directing the Commissioner of the General Land Office to issue the plat to Craig was unauthorized; and the plat issued during the pendency of the appeal and before the same was heard, by reason of such unauthorized order, was null and void.

5. That as the patent was issued after the Bill of Complaint was filed, but before the rendition of the final decree and the issuance of such patent was brought to the knowledge of the Court, the Court had the right to decree the patent to be null and void, for the same reasons it had to set aside the plats, the plat being "equivalent, in legal effect, to an ordinary patent as evidence of title."

## ARGUMENT.

*If the register and receiver were corruptly influenced in their decision or award by Craig, their decision in his favor*

*cannot be the basis of any rights which can injuriously affect Leitensdorfer or any one holding under him.*

Fraud will vitiate any, even the most solemn transactions; any asserted title founded upon it is utterly void. (United States *v.* Amistad, 15 Pet., 518.) A deed or even a judgment, or a decree of a Court of Chancery of twenty years' standing, can all be set aside on the ground of fraud, if clearly alleged in the bill and supported by the proof. (Lennox *v.* Notrebe *et al.*, Hemp., 251.)

These propositions have been repeatedly affirmed, and are recognized as familiar principles of law. The judgment of a Court may be set aside, and the decree of a chancellor declared null and void, when such judgment and decree were rendered honestly, where the judge or chancellor were beyond suspicion and were themselves the innocent victims of the frauds of one or the other of the parties to the suit. With greater reason will a judgment, decree, or award be set aside as null and void when the judge, chancellor, or arbitrator renders a corrupt decision.

Fraud, if properly alleged in a Bill of Complaint and supported by the proof, has uniformly been recognized as affording the proper grounds upon which a Court of Equity is empowered to grant relief.

In Johnson *v.* Towsley (13 Wallace, 85–6–7), the power of a Court of Equity is recognized as being established by decisions, not only by this Court but also in numerous cases in Kentucky, Virginia, and Pennsylvania, to set aside the decisions of the land officers, if such decisions were obtained by fraud, imposition or mistake.

In Moore *v.* Robbins (6 Otto, 535), Miller, J., says: "That in this class of cases, as in all others, there exists in the Courts of Equity the jurisdiction to correct mistakes, to relieve against frauds and impositions; and in cases where it is clear that those officers have, by mistake of law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

In the case of Shepley *v.* Cowan (1 Otto, 340), Field, J., in referring to the officers of the land department, says: "If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they are themselves chargeable with fraudulent practices, their rulings may be reviewed and annulled when a controversy arises between private parties founded upon their decisions."

In this case the appellant and appellee claim different tracts of land. But in the apportionment of the twenty-two leagues of the Las Animas grant, which was confirmed by the United States, the decision of the register and receiver in favor of Craig for over 73,000 acres, absorbing nearly the whole of the grant confirmed, was a denial of the complainant's title, which left him without any means of redress except through the intervention of a Court of Equity. It is the title, not the land of Craig, that is in controversy. Appellee has no claim against the land, and, therefore, no action of ejectment on his part could be sustained. In this, the present case differs from the above-cited cases; but if as between parties claiming the same land, fraud in the decision would render the award null and void, with much greater force can the aid of a chancellor be invoked where no controversy exists between the parties which would be determined by a Court of Law, and where the land itself is not in dispute.

"*Complainant had the right to appeal from the decision of the register and receiver in rejecting his claim, and also from their decision establishing the claim of Craig.*"

It is admitted that, in the ordinary business of the Land Office, there is an appeal from the register and receiver to the Commissioner.

But it is claimed that this is neither a matter pertaining to the survey and sale "of public lands of the United States," nor to "private land claims" against the United States, and that the acts of July 4, 1836, (Stats. 5, p. 107,)

and section 453 of the Revised Statutes have no application.

The act of 1836 (*supra*) provided—

"That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the survey and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of lands under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

That law has been superseded by section 453 R. S., which is as follows:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing the patents for all grants of land under the authority of the Government."

It will be observed that there is no material difference between these two sections, excepting that the Secretary of the Interior is substituted for the President of the United States.

The act of 25th February, 1869 (Stats. 15, pp. 275–440), required the derivative claimants or grantees to establish their rights to the satisfaction of the register and receiver of the proper land district within one year after its passage.

Under this above-quoted statute it is claimed by appellant that no appeal could be taken to the Commissioner of the General Land Office; that the register and receiver were constituted a special tribunal or commission, and clothed with exclusive and final jurisdiction, to pass upon any and all questions of law and fact upon which the title of the derivative claimants might rest.

The original grant from Armijo to Vigil and St. Vrain contained 922 square leagues, but was only confirmed by Congress for 22 square leagues. (12 Stats., p. 71.)

If, as is claimed, the Mexican grant was void for want of jurisdiction of the Governor to make a grant of 922 leagues, then no title passed to the grantees, and after the cession of the lands to the United States by Mexico, they became "public lands of the United States." The parties claiming under the Mexican grant claimed the land as against the United States, and their claims are designated as "private land claims" in the act of 1860. (12 Stats. L., 71.)

It is not necessary to discuss the question as to whether the confirmed 22 leagues of the Las Animas grant were public lands of the United States or not. It is unquestionable, however, that the 900 leagues not included in the confirmation of 22 leagues were regarded as "public lands," and that the title of the United States to said 22 leagues was exactly the same as to the 900 leagues.

Whether the 22 leagues be regarded as public land or as a private land claim is immaterial, as "all executive duties," etc., shall be performed by the Commissioner under the direction of the Secretary of the Interior.

Craig claims title under and by virtue of a patent dated January 8, 1878, delivered to him from Washington. The issuance by the Commissioner and acceptance by Craig, of the patent, is an assertion on the part of the Government officers of a supervisory right, and an admission of such right on the part of the appellant.

If the claimants of the 22 leagues are not seeking to acquire title from the United States, it is hard to conceive against whom they desire to establish such claim. There is no adverse claimant to any portion of the land. All of them claim under the Mexican title, yet they all wish to have their titles recognized by the United States. In other words, they want the title of the United States in the lands

claimed by them. Without the title of the United States, their Mexican title is regarded as worthless, and whether this 22 leagues be a "private land claim" or part of the "public lands," when it is sought to extinguish whatever title the United States may have, recourse must be had to the Land Office, as the Department on which are conferred "all executive duties" relative thereto.

This question has been substantially decided by this Court in the case of Barnard's Heirs *v.* Ashley (18 How., 43), in which it was conceded that, under the pre-emption laws of 1830–34, the register and receiver were invested with the power to decide upon the facts which were supposed to entitle a party to a pre-emption right. The Court, after quoting the act of 1836, say:

"The necessity of supervision and control vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say, that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex-parte* affidavits, cultivation and possession of particular quarter-sections of land when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action, we hold to be true. But if the construction of the act of 1836 were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

This practice, which in 1855 (when this decision was rendered) was nearly twenty years old, has been fostered and nurtured by the Department until it now covers a period of more than half a century. One illustration will suffice. The act of June 2, 1858, entitled "An act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes," provided that it should "be the duty of the Surveyor-General * * upon satisfactory proof * * to issue to claimant * * * a certificate of location," &c. * *

The duty imposed on the Surveyor-General was similar

in all material respects to that imposed on the register and receiver in the present instance. How that act was construed and acted upon by the Department can best be shown by quoting the language of the Secretary of the Interior (Rec. p. 411):

"Under this act the Department assumed to regulate by rules the conduct of the Surveyor-General in discharging the duties devolved upon him, and the Land Office has uniformly and continuously, for a period of sixteen years (23 Jan., 1875), exercised supervision and control over the acts of the Surveyor-General connected with the discharge of his duties under the Act of June 2d, 1858."

Counsel for appellant lay great stress on the case of the U. S. *v.* Ferreira (13 How., 40). This case does not, however, support their position, that under the Act of February 25th, 1869, judicial functions devolved upon the register and receiver, and that their decision was, therefore, a finality, no appeal being provided for in the act.

It is decided in that case, that, although the powers conferred upon the judge, in the matter at issue, were judicial in their nature, for the reason that judgment and discretion must be exercised, "yet it was nothing more than the power ordinarily given to a commission appointed to adjust claims to lands or money under a treaty, or special power to decide any other particular class of controversies in which the public or individuals may be concerned. A power of this kind may be conferred upon a secretary as well as a commissioner. But it is not judicial in either case in the sense in which judicial power is granted by the Constitution to the Courts of the United States."

In the case of Ferreira, *supra*, although by the terms of the law at issue the district judge was "to receive and adjudicate the claims," etc., it was held that he exercised such power as a commissioner and not as a judge, and, therefore, no appeal could be taken to *this* court, under the general law permitting appeals from the judgments of the courts.

The point presented as to the right to appeal from an inferior to a superior Court, is not the same as the right to appeal from the inferior to the superior executive officer. There is no right of appeal from the judgment of an inferior Court except such as is given by legislation, but the legitimate act of the inferior executive officer is, in contemplation of the law, the act of the head of the Department, and when certain duties are imposed upon inferior executive officers, under the general rule of the responsibility of the head of the Department, an appeal to the superior officer can always be had, if not expressly prohibited by the law imposing the duty. Even then, it is submitted that such finality can only be obtained by expressly, and in terms, constituting such inferior executive officer a separate and independent tribunal. The fact that the right of appeal from the decision of an inferior executive officer, to whom certain duties are assigned by law, is not expressed in the act, does not in any way affect such right, because, from the character of his position and duties, it must be inferred.

This position is supported by the leading case of Zellner, (9 Wall., 244,) wherein it was held in relation to the Court of Claims that "the subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization. If new or additional subjects of jurisdiction were conferred, the effect would be simply to increase the labors of the Court in the cases to be heard and determined under the existing organization."

If this is true of distinct and independent tribunals, it must apply with equal force in the complex and intricate ramifications of a great Executive Department where each succeeding official in the ascending scale is held responsible for the acts of his subordinates.

The act for the relief of Richard W. Meade (14 Stats., 611,) authorized the Court of Claims to pass upon certain

private rights, and nothing was said about an appeal, yet this Court, acting under an established system or plan, considered the appeal.

The case of Atocha, 17 Wallace, 445, is in direct accord with the views as above stated. The case was referred to the Court of Claims under a special act, and the whole point in issue is stated by Field, J.: "The matter was referred to the Court to ascertain a particular fact to guide the Government in the execution of its treaty stipulations. The Court has acted upon the matter, and as no mode is provided for a review of its action, it must be taken and regarded as final." The Court was constituted a Special Commission, with duties and powers separate and distinct from its legal organization, and the rule in Ferreira's case (*supra*) applied.

The case of Johnson *v.* Towsley, 13 Wall., 72, cited by appellant, it is submitted, in no way changes or modifies these well-established principles, and does not apply to the case at bar.

By act of June 12, 1858, (11 S. L., 326,) certain powers were conferred upon the Commissioner of the General Land Office, whose decision was to be *final* unless appeal therefrom be taken to the Secretary of the Interior. This act fully recognizes the general right of appeal from the decisions of the register and receiver, and also respects the power of the Secretary of the Interior over his subordinates, by permitting an appeal to be taken to him from a judgment otherwise *final*.

The conclusion of the Court, as stated in the *syllabus* of the case, viz., "That when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions, within the scope of its authority, are conclusive," in no way affects the question as to the right of an appeal from an inferior to a superior executive officer.

The case of Butterworth *v.* Hoe, 112 U. S., 50, was, as

to the power of the Secretary of the Interior to review the action of the Commissioner of Patents in awarding to an applicant priority of invention and adjudging him entitled to a patent.

An appeal is allowed, to a dissatisfied party, from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia by section 4911 of the Revised Statutes. The manner of taking the appeal and the effect is set forth in sections 4912, 4913, 4914, and 4915.

It cannot be doubted that Congress has the power to substitute an appeal to the Supreme Court of the District of Columbia for an appeal to the Secretary of the Interior, nor can it hardly be questioned that were not such an appeal provided by law, it could be entertained by the Secretary under his general supervising powers.

The decision of the case of Butterworth *v.* Hoe, *supra.*, is simply to the effect that Congress may take away, in certain cases, the appellate power of the Secretary of the Interior. Such point is not at issue in this case. The law must expressly or by necessary implication do so.

If the right of appeal from the decision of the register and receiver existed in the case of Lietensdorfer, and such appeal was improperly and illegally refused, and the plat and patent issued without authority of law, such plat and patent as against Leitensdorfer and those claiming under him, or against those to whom an appeal was refused, were properly declared by the Court null and void.

*Even though no appeal lies from the decision of the register and receiver to the Commissioner of the General Land Office, if they have erred in the construction of the law applicable to the case, or have, by a mistake of the law, given to Craig certain land, thereby unlawfully depriving claimant of title to his land, or preventing him from asserting it, such decision is, nevertheless, subject to review by a Court of Equity.*

The decision of the officers of the Land Office is only final when there is a "mere error of judgment upon the weight of evidence in a contested case before them." Then "the only remedy is by an appeal from one officer to another of the Department, and, perhaps, under special circumstances, to the President." (Shepley *et. al. v.* Cowan, 91 U. S., 340.)

If mistaken conclusions as to the law relative to the admission or rejection of evidence, as well as "errors of judgment as to the weight of evidence," could, in any case, be the subject of review by a Court of Equity, the manifest errors and unwarranted conclusions of the register and receiver, when passing upon the claims presented to them in the matter of the Las Animas grant, should be the subject (Rec., p. 324, *et. seq.*) of such review.

It is submitted that the unjustifiable rejection of legitimate testimony, or the improper consideration of irrelevant testimony, would, in itself, justify a Court of Equity in reviewing the decision.

If, however, this Court should hold that for such reason, alone, jurisdiction would not attach, yet if, for any reason, the Court should hold the power to review of the decision existed, then every circumstance in the case can be reviewed; not only the unlawful evidence presented, but also what are, apparently, "errors of judgment as to the weight of evidence," for the reason that when jurisdiction attaches for one purpose it attaches for all, and also as a circumstance helping to determine the question of corrupt influence.

The register and receiver decided, *inter alia*—

"That the delivery of the deed from Vigil and St. Vrain to Eugene Leitensdorfer was utterly invalid.

"That the said conveyance from Vigil and St. Vrain could not have the effect of divesting them of any of their estate in the grant.

"That all grants made by Vigil and St. Vrain to settlers (by deeds or promises to settle) would take precedence of

any claim of Leitensdorfer, or any one claiming under him.

"That if the gift created any right in Eugene Leitensdorfer, it would be only to demand the one-sixth part of the land disposed of by Vigil and St. Vrain to settlers, and one-sixth part of all the money they might sell the lands for after the date of the gift to him.

"That the conveyance by Vigil and St. Vrain to Eugene Leitensdorfer was a gift by them to him. That Thomas Leitensdorfer, claiming under him, Eugene, had no right to appropriate the whole of any particular tract.

"That no settlement by said Thomas (claiming under Eugene) on the tract can be considered such an entry into possession under a contract as to give notice of the title.

"That the 'concession, or gift, rather, of Vigil and St. Vrain to Eugene,' if they ever made any, 'under the circumstances attending its existence, was not notice to the world, and even if accompanied by taking possession of any portion of the tract, was not notice.'

"That 'it cannot be pretended that any one of the settlers on the grant had notice of this gift to Eugene, and those who settled on tracts under promises made them by Vigil and St. Vrain, or either of them, or who purchased tracts of either of those persons are not in any way affected by such gift, even if it had any validity, and we think it had none.'

"That even if Thomas' possession was notice, it was only to the extent of the land he actually had in possession, fenced up or cultivated, occupied by houses and other improvements.

"That there was no sufficient proof that any gift was made in writing by Vigil and St. Vrain to Eugene Leitensdorfer.

"That the claim of Leitensdorfer is 'weak in every possible aspect, without any foundation whatever, and sought to be upheld by a kind of evidence that will not bear the slightest investigation or criticism.'"

The above summary of points decided by the register and receiver is, as will be seen by an examination of the opinion (Rec., p. 324 *et seq.*), far from complete.

It will be observed, even on a cursory examination of

the opinion, that the register and receiver not only "erred in the construction of the law applicable to the case," but that such opinion is in form and substance partisan and wanting in every element of a correct judicial determination. No corrupt influence could have produced an opinion more thoroughly partisan.

If Courts have the power to review the action of the officers of the Land Office for mistakes as to facts or misconstruction of the law, it follows that they can declare such action null and void.

In discussing this point, in the case of Johnson *v.* Towson (7 Wall., 84, *supra*), Miller, J., says:

"There has always existed in courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form the result of that action may assume, when it invades private rights; and, by virtue of this power, the final judgments of Courts of Law have been annulled and modified, and patents and other important instruments issuing from the Crown, or the Executive branch of the Government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception to the principles, * * * which patent shall prevail, and what conclusiveness, or inflexible finality, can be attached to a tribunal whose acts are in their nature so inconclusive. * * * And so, if for any other reason recognized by Courts of equity as ground for interference in such cases, the legal title has passed from the United States to one party, when in good conscience, and by the laws which Congress has made on the subject, it ought to go to another, a Court of Equity * * * will convert him into a trustee of the true owner and compel him to convey the legal title. In numerous cases this has been announced to be the settled doctrine of this Court in reference to the action of the land officers.

"It is fully conceded that when those officers decide a controverted question of fact, in the absence of fraud, or imposition, or mistakes, their decisions on those questions is final, except as they may be reversed on appeal in that Department. But we are not prepared to concede that

when, in the application of facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the Courts are without power to give any relief. And this is precisely what this court decided in the case of Minnesota *v.* Bachelder. (1 Wall., 169, and in the case of Siever *v.* Ladd, 7 Wall., 219.)"

It is held in Moore *v.* Robbins (*supra*), as well, also, as in Shepley *v:* Cowan, (*supra*,) that when fraud, mistakes, or misconstruction of the laws of the case exists the United States, or any contesting claimant of the land, may have relief in a Court of Equity.

If a Court of Equity, in the case of fraud, mistakes, or misconstruction of the law, has the power to grant relief to parties claiming the same tract of land after a patent has issued, the same reasoning as before stated applies with greater force to a case like the present, where the title, and not the land itself, is in dispute.

It follows, therefore, that the intervention of the Court below was authorized, even if there was no right, on the part of the appellee, of appeal to the Commissioner in the Land Office.

If a Court of Equity has the power to set aside a patent issued by the officers of the Land Office, it certainly has the power to review and set aside the decision of the register and receiver where there has been fraud in the procurement of such decision, or where such decision has been made by mistake, or misconstruction of the law applicable to the case.

A misconstruction of the law is admitted on page 40 of appellant's brief, as follows:

"The register and receiver did not report upon other claims presented to them because the claims already established to their satisfaction conveyed the twenty-two leagues confirmed by Congress."

It was not sufficient for the register and receiver to

apportion the twenty-two leagues to such claimants as first made out their claims to their satisfaction, and reject others because the claims already proved absorbed the entire twenty-two leagues.

It was supposed, at the time of the passage of the act of February 25, 1869, that the claims of all actual settlers holding possession under title or promises made by Vigil and St. Vrain, or their legal representatives, would be included within the twenty-two leagues confirmed by the United States, and that a residuum would remain which was to be divided into two equal parts.

It was held by Judge Dillon (5 Dillon, 419 *supra*) that, "As there is not, or may not be, enough land (in consequence of the great reduction in the confirmation of the grant) to satisfy the claims of all, it must have been contemplated that their several rights and equities should be determined by the merits of their respective claims, including the extent of actual occupation and value of improvements as pecuniary elements, rather than the mere date of the grant or promises to settle made by Vigil and St. Vrain under the assumption that they owned 922 square leagues, instead of 22 square leagues as diminished by the act of June 21, 1860."

It is submitted that it was the duty of the register and receiver to examine, as provided by said act of 1860, "the claims of all actual settlers," etc., and to make equitable apportionment, among those "holding possession under title or promises to settle made by Vigil and St. Vrain or their legal representatives."

*The order of the President directing the Commissioner of the General Land Office to issue the plat to Craig was unauthorized; and the plat issued during the pendency of the appeal and before the same was heard, by reason of such unauthorized order, was null and void.*

The question of the power of the President to review the

final deliberate decision of the Secretary, sustaining the Commissioner's appellate jurisdiction, is fully and very ably discussed by Messrs. Bradford and Horner in their briefs presented to the Court in this case. (Page 54 *et seq.*)

If the President had no power to make such order, (Record, p. 228), the title of Craig is not thereby affected or in any way strengthened. Dillon, J., in this case (5 Dillon, 423) holds "that the complainant had the right to appeal from the decision of the register and receiver in rejecting his claim, and also from their decision establishing the claim of Craig, so far as the latter would interfere with the rights of the claimants as they might finally be established. But his appeal and that of the other derivative claimants who appealed were never heard by the Commissioner of the General Land Office, or by the Secretary of the Interior, in consequence of the action of the President, based upon what we are inclined to regard as the erroneous opinion of the Attorney-General, of May 15, 1876, that the decision of the register and receiver was final in such a sense that no appeal would lie therefrom to the Commissioner of the Land Office, and that the Secretary of the Interior had no jurisdiction to review the decision of the register and receiver."

The President derived no authority from the opinion of the Attorney-General. The Opinions of the Attorneys-General are entitled to respectful consideration, but simply because such opinions are given by good lawyers acting under great official responsibility. Such opinions do not in any way partake of a judicial character; they are simply aids to the Executive officers in forming their judgment.

If the President was mistaken in his construction of the law, and made an improper order by reason of such mistake, such order can, under the principles of the authorities before cited, be reviewed by a Court of Equity. The finality of the Executive order of the President is not more conclusive than that of any other Executive officer who has authority to make a final decree.

The case was not submitted to the President on appeal upon its merits. It was, as is shown by appellee's briefs, above referred to, informal in its character, without proper notice to the parties interested, and was virtually a dismissal of the appeal for want of jurisdiction.

If, as before urged, the lawful right of appeal from the decision of the register and receiver existed, such lawful right could not be extinguished except by a repeal of such right by Congress. An Executive order repealing a law is void, and must be so regarded in a review of the case by a Court of Equity.

It is familiar to all that the acts of the heads of the Departments are the acts of the President. He speaks and acts through them. Direct interference by the President, as in this case, with the discharge of Executive duties would lead to inextricable confusion in Governmental affairs.

But, assuming the right of the President to have been properly exercised in declaring the decision of the register and receiver final, such decision is subject to review by a Court of Equity; and if corruptly obtained or fraudulently rendered, or based on mistaken construction of the law, any plat issued by virtue of such order may be declared by the Court null and void.

But it will be seen that in this order of the President, which is claimed by the appellant to be decisive of the finality of the award of the register and receiver, the appellate jurisdiction of the Commissioner and Secretary of the Interior, is recognized. The second clause of that order is as follows:

"If, in the opinion of the Commissioner of the General Land Office, and the Secretary of the Interior, the amount of the land owned by William Craig is less than heretofore awarded, then the order upon the Surveyor-General of Colorado may be for the amount of land deemed due him."

Under this order two questions arise: 1st. As to whether William Craig had *any* ownership in the lands awarded to him by the register and receiver. 2d. If he had any interest in such land, how much less, if any, was such interest than the amount awarded.

The order of the President, therefore, although affirming in words the finality of the decision of the register and receiver, in effect, as to said two points, recognizes the right of appeal upon the merits.

Before deciding such questions adversely to complainant, he had the right to be heard. The Commissioner, however, wrongfully interpreted such order as mandatory to issue the plat.

But if the Commissioner and Secretary had jurisdiction to review such decision upon the points stated, the jurisdiction thus acquired, it is submitted, as in a Court of Equity, would attach to the whole subject-matter of the decision. If the President was right in his command that the plat should issue by reason of the finality of the decision made, he was certainly wrong to give a power of review in the same order.

It is possibly worthy of remark that whatever supervisory power was conferred upon the President by section 1 of the Act of July 4, 1836, was taken away by the adoption of section 453, R. S., and conferred on the Secretary of the Interior. It can hardly be presumed that, by the Act of 1836, Congress contemplated the actual personal supervision of the President in any and all contested land questions which might arise in the office of the Commissioner; but, in any event, when that order was issued (March 2, 1877) the Secretary of the Interior had been, by the Revised Statutes, substituted as the supervising officer, and he had officially decided against the theories advanced by Craig (Record, p. 401) on the 23d day of January, 1875.

We have been unable to find a single instance wherein the President of the United States has claimed the right to

review the decisions of the executive officers of the various departments. On the contrary, we do find numerous instances where parties, thinking themselves aggrieved by the action of executive officers, have attempted to appeal to the head of the Executive Branch of the Government; but in every case the Attorney-General has advised that interference on his part would not only be unwarranted, but illegal. (Opinions Attys.-Gen., 1, pp. 624, 638, 678, 680; 2 *id.*, 481, 507; 4 *id.*, 341, 515; 5 *id.*, 275, 287, 630; 6 *id.*, 226; 10 *id.*, 526, 527; 11 *id.*, 14; 13 *id.*, 28, 387.)

Thus it will be seen that this power has been denied by almost every Attorney-General from William Wirt to A. T. Akerman, and that this view of the law is stamped by the approval of such names as Roger B. Taney, John Y. Mason, Caleb Cushing, John Nelson, and Edward Bates. The rule laid down in Wilcox *v.* Jackson (13 Pet., 498, 513) is one which commends itself.

"The President speaks and acts through the heads of the several Departments in relation to subjects which appertain to their respective duties."

In addition to the above, which embody our views of the law with regard to the relations between the various parties to this suit and the Interior Department and the President, we beg also to submit the following in answer to

THE POINTS MADE BY THE APPELLANT.

Of these there are fourteen; nine of which go to the jurisdiction of the court below, and five to the substance of the decree. Some of these points have, we think, already been fully answered; others require brief notice, while still others depend upon a careful examination and comparison of the testimony. In regard to these latter we will only call attention to the briefs of Messrs. Bradford & Horner, wherein they are ably and elaborately discussed, with copious references to the Record.

The first point discussed in appellant's brief is, in effect:

"That the suit below could not be maintained because Leitensdorfer sued in his own name without having made his trustee either a party plaintiff or defendant."

References to the Record, which show the alleged trusteeship, will be found in appellee's supplemental brief (page 2 *et seq*).

This objection, if well taken, should have been made at an earlier stage of the proceedings. It ought not to prevail upon the hearing of an appeal except when the Court perceives that the omitted party was indispensable. (Bank *v.* Seton, 1 Pets., 306.) Such cannot be the case here, because both Mrs. Farnsworth and Hallum admit the trust, and more than this, Mrs. F., the trustee, is now dead. An affirmance of the decree below vests no title; the parties in interest are *all* relegated to the Interior Department to establish their rights. Under the decision of the register and receiver nothing was left for Leitensdorfer, and hence the trusteeship of Mrs. Farnsworth was an empty form, unless the decree below is affirmed; in that case it may become of importance. But in any event the rights of Craig are in no wise affected by the non-joinder, because she has no title which can be urged against the lands covered by his patents.

If the question at issue in this case involved a claim on the part of Leitensdorfer to the land claimed by Craig, this point might be entitled to consideration.

But Leitensdorfer claims neither the title to nor possession of such lands. Nor does he claim, in the present action, that any title vested in him should be established.

He does claim in the bill that he has title to certain lands included in the Las Animas grant. He claims that he has conveyed portions of his interest to third parties, and these facts alleged in the bill are sustained by the proof. Such facts show that the interest claimed is an equitable one, ac-

knowledged by Hallum and Mrs. Farnsworth, the trustees; and he is, therefore, lawfully entitled to maintain this equitable interest, because his title and the title of those claiming under him has been destroyed by the issuance of the plat and patent to Craig for other lands. There is no question raised as to his competency to sue and be sued in his own name, and it is submitted that he has the individual right to ask the protection of a Court of Equity for an equitable, as fully as to a legal title to his property.

The rule cited by appellant, as laid down by Daniels (Chancery Pleading and Practice, 192), has no application to the present case. The rule is that the person having the legal right should be joined where there is an "equitable right in the *thing demanded.*" This for the reason given, "that if he were not, his legal right would not be bound by the decree, and he might, notwithstanding the success of the plaintiff, have the power to annoy the defendant by instituting proceedings to assert his right in an action at law."

In this case the reason of the rule does not apply; hence the rule itself is without force.

In this case, too, there is no "thing demanded" as the subject of the action. The controversy is as to the finality of the decision of the Register and Receiver and as to the cancellation of the plat and patent claimed to have been issued without proper authority.

The claim that Lietensdorfer is now divested of any title which he may have had at the institution of the suit, and, therefore, the suit in his name cannot be maintained, is, it is submitted, without force.

In Perchman's case (7 Peters, 407), the Court say: "The Court does not enter into the inquiry as to whether the title has been conveyed to Sanchez or remains in Perchman."

In *United States* v. *Sutter*, the Court say: "It is compe-

tent for persons interested in the claim to use the name of the original claimant."

In *Castro* v. *Hendricks* (23 How., 442), the Court held, "the mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a *bona-fide* claimant under the Mexican grant; and so this Court have repeatedly declared that the Government had no interest in the contests between persons claiming, *ex post facto*, the grant."

So in *Brown* v. *Brackett* (23 Wall., 388), it is declared that in Mexican claims this Government is not interested "in any derivative titles from the grantors further than to see that the parties before them were *bona-fide* claimants under the grant."

In the present controversy, the rights of Craig can in no degree be affected by the relative rights of those claiming the Thomas Leitensdorfer settlement. If such settlement and occupation were sufficient to entitle such land to be apportioned within the twenty-two leagues, the question as to whom apportioned, would, in the present controversy, be of no interest to Craig or his assigns.

As to whether Leitensdorfer had complied with the 4th section of the act of 1869 is not an issue in the present controversy. Nor is the question as to whether the lands claimed by Leitensdorfer are within the lines of the Las Animas survey.

These are questions which complainant has a right to have determined in his appeal from the decision of the register and receiver. The decision of these points in the land office, whatever might be the result, would under the authorities be final, if not procured by fraud or rendered under a misconstruction of the law.

Upon these two points, and especially upon the latter,

we call attention to the very complete and elaborate answer contained in appellee's supplemental brief, page 5 *et seq.*

The several objections made to the decree of the Court below—that it cancels the evidence of the whole of Craig's title; because it cancels the evidence of that portion of the title derived from Leitensdorfer; because it cancels Craig's title without inquiry as to the amount of Thomas Leitensdorfer's lands; and because it cancels a patent of the United States—seem to be based on the proposition, in opposition to the fact, that the only claimants under the Las Animas grant were Leitensdorfer and Craig.

The plat and patent could only properly issue in pursuance of a decree of the register and receiver legally rendered. If such decision was rendered corruptly, or under a misconstruction of the law, or by mistake, or if complainant had a right to be heard on appeal, the plat was improperly issued and was null and void. Craig's title to his land was and is dependent upon a proper decision of the register and receiver. Whether any portion of his title was derived from Leitensdorfer is immaterial. Nor is it material as to how much land Leitensdorfer claimed in the grant. He does not claim any of that claimed by Craig. Under the act of 1869, all claimants have a right to be heard—not Leitensdorfer and Craig alone. The specific objections to the cancellation of the grant made by appellant, it is submitted, are manifestly without weight. If the Court below had the authority to declare the plat null and void, such authority could only be based upon the fact that the register and receiver had no right under the circumstances to issue the plat at all.

That the Court had the right in this case to review the decision of the register and receiver, and that a right of appeal to the Commissioner and Secretary from such decision existed, has been heretofore discussed.

Counsel for appellant say that this suit should have been brought by the United States.

We insist that—

*A patent for land may be impeached in a suit brought in the name of the United States; it may be impeached collaterally in a Court of Law in an action of ejectment, or may be set aside by the decree of a Court of Equity in the establishment of a private right.*

It is only when the Government is directly interested in the result of the action that it is necessary that the suit to cancel a patent should be brought in the name of the United States. Where, as in *Mullin* v. *U. S.*, (118 U. S., 276), "if the title is vacated the lands will be restored to the public domain," the United States being the party in interest, should unquestionably bring the suit to cancel the patent. But in the case at bar, under no circumstances, in the present suit, could any title of the United States in the land be affected. The practical effect of the act of 21st June, 1861 (12 S. L., 70), is to vest 22 leagues of the Vigil and St. Vrain grant in their derivative claimants. As to which of such derivative claimants the land should be apportioned is no direct interest to the Government. This Court has frequently declared that the Government has no interest in the contests between persons claiming, *ex post facto*, the grant," (referring to a Mexican grant). (Castro *v.* Hendricks, 21 How., 170.)

The case of Patterson *v.* Winn (11 Wheaton, 301) does not decide, as implied by appellant in his brief, that except in certain specific cases, suit as to the validity of a patent for lands must be brought in the name of the United States.

The main point of controversy in that case was as to the relative jurisdiction of Courts of Law and Equity, and that point was declared settled in the case of Polk's lessee *v.* Wendall (9 Cranch, 87).

Thompson, J., says in reference to the issuance of a patent, "That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself." * * * * "But, in order to guard against the conclusion that this doctrine would lead to—closing the door against all inquiry into any matter whatever beyond the grant, for the purpose of avoiding it—the Court add, that the great principles of justice and of law would be violated if there did not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined, if it had been acquired by violation of principles essential to the validity of a contract, but that a Court of Equity is the more eligible tribunal, in general, for these questions, and they ought to be excluded from a Court of Law. But the Court say there are cases in which a grant is absolutely void (or inoperative), as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."

It is part of the theory of appellant that the United States simply confirm a title which is held under and by virtue of a Mexican grant, and that for the purposes of that confirmation the issuance of the patent is unnecessary and unwarranted. Whether under the provisions of the said act of 21st June, 1860, the twenty-two leagues' part of the Las Animas claim be regarded as a cession of lands owned by the United States, or a confirmation of a title held by virtue of a Mexican grant, in a controversy as to apportionment of said twenty-two leagues between derivative claimants from Vigil and St. Vrain, the United States has no interest. Such land was confirmed by the act of 1860, and therefore the United States has no title, it is submitted, in the sense the term "no title" is used in the above-cited description of *Patterson* v. *Winn.*

If the Court should hold there was a right of appeal from the decision of the register and receiver, it follows that the plat and patent were issued without authority, and are therefore, under the said decision in *Patterson* v. *Winn*, impeachable collaterally in a Court of Law.

It is, however, immaterial in the present case as to whether the patent is impeachable collaterally in a Court of Law or not; it is the subject of review in a Court of Equity. This is fully recognized in *Johnson* v. *Towsley*, *supra* (13 Wall., p. 84 *et seq.*) It is stated in that case: "Numerous cases are found in the courts of Kentucky and Virginia where they have, by proceedings in equity, established the junior patent to be the title instead of the elder patent." "There is a similar course of adjudication in the State of Pennsylvania, and we doubt not cases may be found in other States."

In all of these cases referred to, the patent has been attacked collaterally, and the power has been recognized in the Courts to set aside a patent, or render it inoperative, and therefore null and void.

The case of United States *v.* Throckmorton (98 U. S., 70) is a case where the Government was a party interested in the result of the suit. Leitensdorfer claims that he and his grantees are embraced among the derivative claimants from Vigil and St. Vrain. If he is included among such derivative claimants, he has, by virtue of the act of 1860, a right of apportionment in the said twenty-two leagues. By virtue of the act of 1869, he has a right to establish his claim. He has a vested interest in the land, of which the Government cannot by the unauthorized acts of its officers lawfully deprive him. He cannot be deprived of his property, even for public use, except by due process of law and for just compensation. What cannot be done directly cannot be done by indirection. If he is entitled to be heard on his appeal from the decision of the register and receiver, an unauthorized act of any Government

officer, pending the appeal, which would deprive appellee of the benefit of the decision of the case after hearing of the appeal, if in his favor, would be null and void. He would be the party interested—not the United States; and he, not the United States, would be entitled to the decree of a Court of Equity.

The assent of the Attorney-General to bring suit in the name of the United States, to set aside the patent and plat, would be a subject of discretion. It cannot be presumed that such discretion would be exercised in his favor. It would be unjust and inequitable that complainant, by the exercise of such discretion against him, should be unlawfully deprived of his property without compensation.

Respectfully submitted,

JOHN PAUL JONES,
F. P. DEWEES,
For LEANN S. KING,
*Intervenor.*

D. W. VOORHEES,
*Of Counsel.*

WHEREAS, *Leann S. King*, as *administratrix* of the goods and chattels which were of *John Q. A. King*, deceased, did at the Special November Term, A. D. 1881, of the District Court for the County of Arapahoe, in the State of Colorado, recover judgment against *John Hallum* and *Thomas Leitensdorfer* for the sum of *ten thousand dollars* and costs of suit, upon which judgment execution was issued dated on the 24th day of January, A. D. 1882, directed to the sheriff of the county of Las Animas, in the State of Colorado, to execute; and by virtue of the said execution, *Juan Vigil*, then sheriff of the said county of Las Animas, levied upon the lands hereinafter described, and the same were struck off and sold to the said *Leann S. King*, she being the highest and best bidder therefor, and the time and place of the sale thereof having been duly advertised according to law,—

NOW, THEREFORE, *Know all men by these presents*, That I, *Juan Vigil*, sheriff of the said county of Las Animas, in consideration of the premises, have granted, bargained and sold, and do hereby convey, to the said *Leann S. King*, her heirs and assigns, all of the following-described tracts of land situate in the county of Las Animas and State of Colorado, to wit: The west half of section *thirteen* (13); all of sections *twenty-two* (22), *twenty-three* (23), *twenty-four* (24), *twenty-seven* (27); the west half of section *twenty-eight* (28); all of section *thirty-three* (33), and the west half of section *thirty-two* (32);—all situate in township *thirty-two* (32) south, range *sixty-three* (63) west; all of sections *five* (5), *seven* (7), *eight* (8), *seventeen* (17), *eighteen* (18), *nineteen* (19), *twenty* (20), *twenty-one* (21), *twenty-two* (22), *twenty three* (23); the west half of section *twenty-five* (25); all of sections *twenty-six* (26), *twenty-seven* (27), *thirty-four* (34), *thirty-five* (35), and the west half of section *thirty-six* (36), in township *thirty-three* (33) south, range *sixty-three* (63) west; sections *thirteen* (13), and *twenty-four* (24), township *thirty-three* (33) south, range *sixty-four* (64) west:

TO HAVE AND TO HOLD the said described premises, with the appurtenances thereunto belonging, to the said *Leann S. King*, her heirs and assigns forever.

Witness my hand and seal this 6th day of January, A. D. 1883.

JUAN VIGIL, [SEAL]
*Sheriff of Las Animas County.*
By ————————, *Deputy.*

STATE OF COLORADO,
*Las Animas County,* } *ss.*

Before the undersigned, a notary public in and for the said county of Las Animas, this day personally came Juan Vigil, sheriff of the said county of Las Animas, and acknowledged to me that as such sheriff he had executed the foregoing deed as and for his official act and for the purposes therein set forth.

Witness my hand and notarial seal this 6th day of February, A. D. 1883.

[SEAL] JOHN Q. WHITE,
*Notary Public.*

[Endorsed]: Juan Vigil, sheriff, to Leann S. King. State of Colorado, County of Las Animas, *ss.* I hereby certify that this instrument of writing was filed for record in my office this 6th day of February, A. D. 1883, at 4 o'clock P. M., and duly recorded in Vol. 17, pages 107 and 108. Jesus Ma. Garcia, recorder, by N. D. Jaramille, deputy.

123-189

FEB 24 1887

# Supreme Court of the United States;

OCTOBER TERM, 1886.

WILLIAM CRAIG'S Executor, *Appellant*,
*vs.*
THOMAS LEITENSDORFER'S Adm'r, *Appellee*,
} No. 2.

*Appeal from the Circuit Court of the United States for the 8th Circuit, and District of Colorado.*

***Supplemental Brief for Appellee, in Reply to Appellant's Brief filed 5 October, 1886.***

ROBERT H. BRADFORD,
CHARLES W. HORNOR,
*Counsel.*

**See Table of Contents--(over.)**

## TABLE OF CONTENTS.


Page.

Reply to appellant's *Statement of Case*, . . . . 1

Reply to appellant's I. point—non-joinder of appellee's trustee, . 2

Reply to appellant's II. point—appellee has but undivided interest in residuum, . . . . . 4

Reply to appellant's III. point—appellee did not file, with surveyor general, statutory notice of location, . . . . 5

Reply to appellant's IV. point—appellee's claim is not in *grant*, 6

Reply to appellant's V. point—appellee's interest had ceased before suit, . . . . . 19

Reply to appellant's VI. point—appellee shows no error in decision of Stanton & Cook against him, . . . . . 30

Reply to appellant's VII. point—evidence before Stanton & Cook justifies their decision against appellee, . . . . . 31

Reply to appellant's VIII. point—decision of Stanton & Cook is final in law—and they are innocent of fraud, . . . . 31

Reply to appellant's IX. point—bill should have been filed in name of U. S., . . . . . 42

Reply to appellant's X. point—decree below erroneous; it cancels Craig's title for more than 8000 acres, the maximum of appellee's claim, . . . . . 43

Reply to appellant's XI. point—decree erroneous: it cancels all Craig's title, though he held much of his land by deeds from appellee's vendors, antedating appellee's title, . . . . 44

Reply to appellant's XII. point—decree erroneous: it cancels all Craig's title, though the appellee's claim had been reduced to about *minus* 640 acres, . . . . . 44

Reply to appellant's XIII. point—decree erroneous: it cancels a U. S. patent issued after issue joined and not mentioned in pleadings; &c., . . . . . 45

Reply to appellant's XIV. point—decree should have been limited to land Craig owned when it was passed, . . . . 47


APPENDIX.


No. 1. Act 4 July, 1836, to reorganize general land office, . 48

No. 2. Act 3 March, 1849, to organize interior department, . 48

No. 3. Act 21 June, 1860, confirming Vigil & Saint Vrain claim; &c., . . . . . 49

No. 4. Act 25 Feb., 1869; proof and location of derivative claims; &c., . . . . . 50

No. 5. Joint Res. 28 Ap., 1870: extends time to prove claims, &c., 52

No. 6. R. S. § 441, 453, 2478: supervisory powers of commissioner and secretary, . . . . . 52

IN THE

# Supreme Court of the United States.

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No. 2.

*Appeal from the Circuit Court of the United States for the 8th Circuit, and District of Colorado.*

## *Supplemental Brief for Appellee.*

On the 5th of October, 1886, a brief of 62 pages was filed in this case for appellant, but we had not seen it when, on the 9th of that month, we filed our first brief for appellee. There are points and authorities, therefore, in appellant's brief, not anticipated or discussed in our own. It is to answer those points and authorities that we now file this supplemental brief.

### REPLY TO APPELLANT'S STATEMENT OF THE CASE.

Appellant's brief, on p. 12, says "Craig paid his amount of the fees before he got his plat (Bill, p. 41)," &c. Leitensdorfer's bill, p. 41, does not allege this. The bill, p. 48, alleges that Craig paid "under protest." The derivative claimants, if actual settlers, were anomalous homesteaders, not confirmees, and were not required by law to pay any costs of survey. (Act 25 February, 1869, s. 2, 15 stat., 275, being No. 4 in appendix to this brief.) On the same page of appellant's brief, he says the bill "admits that he has a right to land where he settled and claims to have, and that is many miles distant from the settlement made by complainant. (See Bill, p. 44.)"

"Craig's title, therefore, is not in issue," &c.

The bill makes no such admission, It charges, p. 44, "that complainant's claim is not in conflict on the ground with Craig's claim, but is many miles distant," &c. It does not admit that Craig has a right to any land. It asserts that his title is fraudulent and illegal. (Transc., 49.) The object of the supplemental bill is to obtain the cancellation of Craig's title as a cloud on Leitensdorfer's title.

## Reply to Appellant's First Point.

The 1st point in appellant's brief, p. 18, is this:

"The suit cannot be maintained because Leitensdorfer, only claiming to be entitled to a resulting trust, has brought the suit in his own name alone, not having made his trustee either a co-plaintiff or a defendant in the suit."

But Thomas Leitensdorfer only asks the cancellation of Craig's title in order that Leitensdorfer's appeal before the commissioner may be tried; and he is entitled to the trial of that appeal without respect to its merits, just as Craig is entitled to the trial of his appeal before this court, without respect to the merits of his title. As the cases of Leitensdorfer and Craig must, if Craig's title be canceled here, proceed before the bureau and department, in their names or the names of their personal representatives, without the substitution of persons claiming a legal or equitable title to the derivative claims involved in this suit, (Mrs. King's case, Decis. of Dept. of Int. relating to Pub. Lands, II, 378, *380*; III, 110, *111*,) it is reasonable that those derivative claimants, or their personal representatives, should be the sole parties in this subsidiary proceeding before the judiciary.

Under the act of 3 March, 1851, (9 stat., 631,) to settle private land claims in California, it is provided, in s. 11, that the commissioners and the U. S. district and supreme courts shall be governed by "the principles of equity," among other rules of decision. In John A. Sutter's claim, where the commissioners confirmed his title and their decree was affirmed by the district court, the government appealed to this court, (U. S. *v.* Sutter, 21 Howard, 170,) contending that the claim should have been instituted by Sutter's grantees, as the record showed that he had conveyed nearly all his estate in the grants presented by him. (*Id.*, 182.) But the court thought otherwise; saying, (*id.*,) "the contrary practice was sanctioned in Percheman's case, (7 Pet.) and has been followed since. It is competent to persons interested in the claim to employ the name of the original claimant. (United States *v.* Percheman, 7 Peters, 51, [97;] United States *v.* Patterson, 15 How., 10.)"

So, in Castro *v.* Hendricks, (23 Howard, 438, *442*,) this court, construing s. 9 of the California act of 1851, said :—"The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court have repeatedly declared that the Government had no interest in the contests between persons claiming ex post facto the grant. United States *v.* Sutter, 21 How., S. C. R., 170."

The rule in Dan. Ch. Pr., 192, (and see Adams' Equity, p. 317, Am. ed. of 1855,) on which appellant founds his 1st point, relates to cases where the *cestui que trust* claims and sues for *property;* but here Leitensdorfer does not ask a decree for Craig's land or for any land.

The estate of Mrs. Farnsworth, (now dead,) Thomas Leitensdorfer's sister and trustee, would, in any case, have been bound by this court's decree; for she was a witness for her *cestui que trust* and hence was cognizant of the fact that he was suing for all having any interest in his derivitive claim. (Her testimony, Transc., 425.) She proved that she held Darby's interest, $\frac{2}{16}$, in Thomas Leitensdorfer's derivative claim, in her own right. (Transc., 426.) On 1 July, 1873, complainant, after filing his claim, conveyed his whole interest in it to John Hallum—half for Hallum and half for Hallum in trust for himself. (Transc., 84.) On the 5 May, 1874, Hallum conveyed to Mrs. Farnsworth, in trust for complainant, (*id.*,) the undivided $\frac{1}{2}$ which Hallum had held in trust for him. (Transc., 172.) This suit was filed 4 May, 1877. (*Id.*, 1.) On the 18 December, 1880, after decree for complainant below, he made an absolute conveyance to his sister, Mrs. Farnsworth, of all his interest in this grant, in consideration of money loaned, and of the care and education of his children. (P. 71 of "Evidence in behalf of Appellant in support of motion for rule to show cause.") After this court, on the 16 January, 1882, dismissed Craig's first appeal, Mrs. Farnsworth, on the 10 April, 1882, for $20,000 cash, made to our client, Thomas J. Allen, a deed for all the land in this derivative claim; (p. 11 of our "Answer to Motion of Appellant," filed here 31 October, 1885;) and she swore that the lands so conveyed were the same involved in this suit in this court. (*Id.*, p. 22.) Her trust for Thomas Leitensdorfer is extinct, for he, too, sold all his interest to Allen on the 10 April, 1882. (*Id.*, 13.) The whole title of the trustee and of the *cestui que trust* is hence in Allen, who has *appeared* in this suit. It is impossible, therefore, to hold that the trustee's heirs or representatives could, after the decree of this court, sue Craig's heirs or representatives in her own right.

Appellee filed his claim at Pueblo on the 23 October, 1872. (Transc., 285.) His conveyance to Hallum, under whom Mrs.

Farnsworth held, was made on the 1 July, 1873, when Hallum was his counsel to prosecute that claim. (*Id.*, 84.) The conveyance was made, therefore, *pendente lite*, and cannot affect the trial of the appeal before the commissioner, (Decis. of Dept. of Int. relating to Pub. Lands, II, 378, *380;* III, 110, *111,*) the prime object of this suit; for the U. S. statutes do not require the publication of any *lis pendens.*

Craig might have objected specifically to the non-joinder of Mrs. Farnsworth, by plea or answer, (Rules of Practice in Equity, Nos. 39 and 52,) or even at the hearing. (Rule 53.) But, not having objected at all below, the objection cannot be made for the first time here. Non-joinder "must be taken advantage of before the final hearing." (Ril. Ch., 138; 1 Ala. N. S., 580; 18 *id.*, 576; 24 Conn., 586; 1 Des., 315; 1 Stockt. Ch., 401; 10 Paige Ch., 445; 2 Sandf. Ch., 17; 2 Iowa, 55; 2 McLean, 376; Bouv. Dic., "NON-JOINDER.")

## REPLY TO APPELLANT'S SECOND POINT.

His brief, p. 19, avers that complainant could be entitled to no more than "an undivided interest in the residuum of the lands confirmed after satisfying all the claims of the derivative claimants properly so called; but as there is no residuum for the original grantees, there are no lands to which Leitensdorfer's interest can attach."

The bill does not say that Eugene Leitensdorfer was a derivative claimant, but it says that Thomas Leitensdorfer was a derivative claimant, with actual settlement from May, 1862, till suit. (Transc., 37.) Being an *actual settler*, under a title made by Vigil and Saint Vrain to his brother Eugene Leitensdorfer, (since dead,) Thomas Leitensdorfer was within s. 2 of the act of 21 June, 1860, XII stat., 71, and s. 1 of the act of 25 Feb'y, 1869, XV *id.*, 275; (appendix to this brief, Nos. 3 and 4;) and it follows that he was a *derivative claimant*, and his settlement located his claim and severed it from the unincumbered U. S. lands within the grant.

It is also objected by appellant's brief, p. 21, that the donation of 7 March, 1844, by Vigil and Saint Vrain to Eugene Leitensdorfer, was not legally delivered. The answer to this, is, that delivery to a third person is enough, though he is not the grantee's agent, and though the grantee may not get the deed till after the grantor's death. (4 Kent Com., 456, n. *a*; our brief filed 9 Oct., 1886, p. 40.) Moreover, in 1846, Hatcher, as agent for governor Bent and Eugene Leitensdorfer, was *in possession* of the grant on the Purgatoire or Las Animas river. (Transc., 298.) This fact shows that Eugene Leitensdorfer accepted the donation before the Mexican treaty of 2 February, 1848, (9 stat., 922.) Acceptance com-

pleted the donation, and delivery was not necessary. (Civil Law of Spain and Mex., art. 987.) Cornelio Vigil was killed on the 19 January, 1849, (Transc., 434,) and Ceran Saint Vrain died several years before the 15 November, 1878. (*Id.*)

Respecting this donation, appellant's brief, p. 22, objects that "there is nothing in the record to show that the original deed could not have been procured and placed in evidence." Crittenden, in Saint Louis, was in possession of the original deed, and he told the witness, William A. Bransford, that "he intended to hold on to the deed until Leitensdorfer paid him." (Transc., 438.) The copy, now objected to, was filed in the Pueblo land office, on behalf of Thomas Leitensdorfer's derivative claim, on the 23 October, 1872, during the trial of the claim, (Transc., 287,) without objection by Craig. *This was a waiver of the objection.* Original deeds are not required in trials before registers and receivers. Copies suffice. This question of evidence is fully discussed in our reply to Craig's fifth point, *post.*

## Reply to Appellant's Third Point.

On p. 22 of his brief, appellant objects that complainant and his vendors did not comply with s. 4 of the act of 25 Feby., 1869, by "making locations with specified adjustment of boundaries; and filing the same with the Surveyor General within three months, after the surveys were completed and notice given provided for in the second section of the act," &c.

But s. 4 of the act of 1869 only applies to Vigil and Saint Vrain and to the representatives of their hypothetical residuary interests in the 22 leagues, (commissioner to register and receiver, 23 August, 1870, Transc., 266; commr. to surveyor genl., 23 August, 1870, Transc., 269, *272;* commr. to secretary, 29 July, 1876, Transc., 182, *183,*) and not to the actual settlers holding possession under titles or promises to settle. (Commissioner's instructions, Transc., 266, 269; secretary Delano's decisions of 27 October, 1874, and 23 January, 1875, *id.*, 399, 406.) The grantees were not settlers, and the supposed 11 leagues of each was a float, and it was essential that they should locate their floats and thus let the U. S. dispose of the vast unconfirmed residuum of the grant; but with respect to the actual settlers, with or without title from the grantees, the settlement, as in ordinary preëmptions and homesteads, imported both location and notice. The sole duty of complainant was to establish his claim before the register and receiver within a year from the approval of the subdivisional surveys, (S. 1 of act of 1869; joint res. of 28 Ap., 1870, 16 stat., 373, and appendix to this brief, No. 5.) The limitation ended on the 24 February, 1873, (Transc., 188,) but appellee had filed his claim at Pueblo on the 23 October, 1872. (*Id.*, 285.)

Appellant assumes, on p. 24 of his brief, that complainant was in default because he did not file a location of his claim with the surveyor general. Such filing was not necessary. The jurisdiction of the surveyor general to *survey* these derivative claims of the actual settlers, as vested by the act of 21 June, 1860, s. 2, (12 stat., 71,) was taken away by the act of 25 February, 1869, which substituted the office of the register and receiver as the proper place for the primary establishment of these claims. After the act of 1869, complainant had no duty to discharge with respect to the surveyor general.

## Reply to Appellant's Fourth Point.

The most ominous point in appellant's brief is the 4th, on p. 25, namely,—

"This suit cannot be maintained because the specific lands claimed by Thomas Leitensdorfer are not within the boundaries of the original grant made to Vigil and St. Vrain."

*This question of boundary cannot properly be solved, save by the land office* when these derivative claims shall come up for decision, on their merits, by the commissioner and secretary. We had therefore deferred sifting the intricate and technical question; but as appellant has now raised it in this court, he must be answered.

The survey of *all* public lands of the U. S. and of *all* private land claims confirmed by authority of congress, must be made by the federal surveyors general and their deputies, (R. S., § 2223,) as agents of the commissioner, (*id.*, § 453,) who acts under direction of the secretary. (*Id.*, § 441, 453, 2478; see those sections, appendix to this brief, No. 6.) It is "the duty of the general land office" to cause to be made all the surveys contemplated by the act of 25 February, 1869. (See s. 2 of act.) And, generally, the commissioner's authority "necessarily embraced the examination of all surveys of such private claims, and their correction, until made conformable with the right conferred upon the claimant by legislative act or judicial decree. The surveys of private land claims under Mexican grants in California, were thus subject to his control." (Le Roy *v.* Jamison, 3 Sawyer C. C., 369, by Field, J.; s. c., Lewis' Leading Cases, 608, *621–2*.)

In the Las Animas grant, the bounds fixed by the *juridical possession*, (Transc., 253,) would ordinarily "be accepted as conclusive by our government;" (Van Reynegan *v.* Bolton, 95 U. S., 33, *35*;) and if a question arises whether the operations of the surveyor general have disregarded those bounds, "it must, in the first instance, be determined by the Land Department," * * * "to which the supervision and correction of surveys of private land claims are intrusted." (*Id.*, p. 35–6.)

It follows that if, in the opinion of this court, the complainant has not proved, *prima facie*, a settlement *within the Las Animas grant*, the court will not attempt to fix or define the bounds of the grant, but will leave them to be ascertained by the commissioner when he tries Leitensdorfer's appeal, now pending before him. To know if complainant's settlement is *prima facie* in the grant, the *eye-draft* (Transc., 347,) must be consulted. "The applicant for land usually accompanied his petition with a deseño, or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills, and mountain ranges." * * * "But where land had no value, and the unit of measurement was a league, such monuments were considered to be sufficiently certain," * * * "and this court have no discretion to enlarge or curtail such grants, to suit our own sense of propriety, or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected." (U. S. *v.* Sutherland, 19 Howard, 363, *364–5*, *per* Grier, J.)

The deseño, here, brings Leitensdorfer's claim *prima facie* within the grant, as will be shown presently; but, if it does not, *the question must be left to the executive*. This is, in substance, a grant of 22 leagues within out-bounds containing 922 leagues. But, "the surveys of confirmed Mexican grants, particularly when they are for quantities lying within exterior boundaries embracing larger tracts, involve the consideration of various matters, not properly the subject of judicial inquiry." * * * "If the survey does not conform to the decree of the board, the remedy must be sought from the Commissioner of the General Land Office before the patent issues, and not in the District Court." (U. S. *v.* Sepulveda, 1 Wall., 104, *108*, *109*, *per* Field, J.)

Moreover, the question whether complainant's claim is in the grant, is not vital. If the grant had been confirmed for its 922 leagues, its bounds would be important; for so much of complainant's claim as might possibly be found, in the end, to be out of those bounds, would be a redundant and illegal appropriation of U. S. land *pro tanto*. It would be an unauthorized enlargement of the grant. But the grant was only confirmed for 22 leagues or 97,650.96 acres; and complainant simply asks the court to let in his claim for a share of that fund, and should that be done, it is not material to the U. S. or Craig whether the claim is in or out of the Las Animas grant. In no case could the cancellation of Craig's title and the allowance of complainant's title, increase the aggregate area of the derivative claims beyond the 97,650.96 acres. Complainant was one of the "actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles, or promises to settle" made by them, and hence is, *prima facie*, within s. 1 of the act of 1869.

But complainant's claim is also *prima facie* within the grant. To show this, parol is admissible. "The courses and distances laid down in a survey, especially if it be ancient, are never, in practice, considered as conclusive; but, on the contrary, they are liable to be materially changed by oral proof, or other evidence tending to show that the documentary lines are not those actually run." (Conn *v.* Penn, Pet. C. C., 496, as quoted 1 Abb. Nat. Dig. of Repts. and Stats., 365, No. 73, ed. of 1867.) Parol is often admissible to identify and ascertain the locality of monuments called for by a description; (13 Pick., 267; 19 *id.*, 445;) and where the description is ambiguous, the practical construction given by the parties may be shown. (1 Metc., Mass., 378; 7 Pick., 274; Bouv. Dict., "Boundary.") Now, Thomas Leitensdorfer's home is in the Las Animas valley, on N. W. ¼ of sec. 24, T. 32 S., R. 63 W.; (Transc., 311;) and his claim covers the valley from a mile below his home up 7 or 9 miles to Trinidad and a mile above it. (*Id.*, 310; 302-3.) On the 15 November, 1878, Thomas O. Boggs swore that he had known the Las Animas grant 25 or 30 years, and that he had known Vigil and Saint Vrain since 1844. (*Id.*, 434.) When asked about the south line of their grant, he said, "I understood it commenced at the northern line of Beabuen and Mirando grant." (*Id.*, 435.) He was then asked "At what point of Zobien and Marando grant does the Las Animas grant commence, and in what direction from there does the southeastern line run and to what point?" "Ans. Commencing at N. E. boundary and running and striking the Arkansas river one league below the mouth of Las Animas river." When asked if complainant's claim is in the grant, he said, "I understand his claim is located in and around Trinidad. I understand it to be in limits of Las Animas grant." (*Id.*)

The Beaubien and Miranda grant has been patented by the U. S., (2 Decisions of Dept. of Int. on Pub. Lands, 591,) for the area contained in the act of juridical possession; but we learn that the government has sued in Colorado, and perhaps in New Mexico, to cancel the patent on the ground that the claim is valid for but 22 leagues. However, the original grant, as surveyed and patented by the U. S., is an irregular square, whose lines run in the general direction of the cardinal points. (Commissioner's map of Colorado of 1881, and his last map of the U. S.) The north line of the grant, which is the south line of the Las Animas grant, is shown as running west, on the deseño of the latter. (Transc., 347.) Now, the witness Boggs when asked "At what point" on the north line of the former does the south-east line of the Las Animas grant begin, said, "Commencing at N.E. boundary and running and striking the Arkansas," &c., (*Id.*, 435,) manifestly referring to a point and not a line, for the term *boundary* "is applied to include the objects placed or existing at the angles

of the boundary lines, as well as to those which extend along the lines of separation." (Bouv. Dict., "Boundary.") But a right line extended, on the maps above cited, from Beaubien and Miranda's N. E. corner to the Arkansas, a league below the mouth of the Las Animas, would leave complainant's claim in the Las Animas grant. In Rafael Chacon *et al.*, (2 Decisions of Dept. of Int. on Pub. Lands, 590, *591*,) the secretary, on the 18 June, 1884, after discussing the question of the east boundary of the Las Animas grant, said, respecting T. 33 S., R. 63 W., which contains the bulk of Leitensdorfer's claim: "The south boundary of Vigil and Saint Vrain is the north line of Beaubien and Miranda; and connecting that line, as located on the official map of New Mexico, in this office, with the east boundary on Mr. Dallas's sketch, the whole of T. 33 aforesaid is included within said limits." Now the maps of Colorado and New Mexico, published by the U. S., show that if the east line, thus sanctioned by the secretary, leaves T. 33 S., R. 63 W., in this grant, it necessarily leaves all of Leitensdorfer's claim in the grant.

This conclusion agrees, in substance, with the evidence of Porcheus L. Wootton, sr. (Transc., 444.) He traveled over the grant in 1836; knew Vigil, Saint Vrain, Eugene Leitensdorfer and Governor Bent; was very familiar with the country through which the east line of the Las Animas grant runs, having traveled over all of it, and he testifies that the line passes about 6 miles south of Trinidad, running to the Arkansas river about 3 miles below the mouth of the Las Animas. (*Id.*) *He also swore that Vigil, Saint Vrain, Bent and Leitensdorfer always claimed the Las Animas Valley to be part of the Las Animas grant.* (*Id.*) Now, the maps show that a right line run from a point 6 miles or 1 township south of Trinidad to a point on the Arkansas a league below the confluence of the Las Animas, would leave complainant's improvements and nearly all of his claim in this grant.

So, Wm. A. Bransford, who had known the grant since 1844, (Transc., 437,) swore that Saint Vrain, Governor Bent, Eugene Leitensdorfer, and other claimants of the grant, always claimed that "the Las Animas river from its source to its confluence with the Arkansas river and one league below is all within the Las Animas grant." (*Id.*, 440.) He added that "the grant took its name from Las Animas river." (*Id.*)

The testimony of Wootton and Bransford thus shows that complainant's land, if not within the *grant* as construed by the technical and rigid rules of the common law, is at least within the acts of 1860 and 1869; for the evidence proves that the land is "upon the tracts heretofore claimed by the said Vigil and St. Vrain," in the words of s. 1 of the latter act, or, is "in the tracts claimed by them," to use the words of s. 2 of the former act.

Calvin Jones knew the grant, complainant's claim, the parties to this suit, Saint Vrain, and the southeast line of the grant. (Transc., 432–'3.) He swore that, in 1863 he, with some Mexicans, helped Col. Means, a surveyor, (since dead, *id.*, 436,) in running the line; that it is over 140 miles long; that it passes south of Trinidad 8 or 9 miles; that complainant's claim "*is within the grant,*" on Las Animas river, extending from 9 miles below Trinidad to 1½ or 2 miles above it, and also running up Gray's creek into the mountains and coal lands; that complainant was at work on his claim in 1862 and has been on it ever since, and has a ditch on it about 1½ miles long, which he made in 1862, and has on it 4 hewed log cabins, and cultivates about 140 acres, and that complainant's improvements are worth about $1,000. (Transc., 432–'3.) Witness came to that country in 1846, and Eugene Leitensdorfer was claiming the land then. (*Id.*, 434.) On the 26 March, 1865, long before Craig filed his claim with Stanton and Cook, he made a warranty deed, as the general agent of Ceran Saint Vrain for the Las Animas grant, to Felipe Baca, for a tract on that river, of 76.92 acres, being lot 117 on "the survey of the Las Animas Grant by Col. Thomas Means." (See deed, Transc., 441.) This tract is in and opposite Trinidad. (Bransford's evidence, *id.*, 440.) And on the 20 January, 1866, Craig, as agent of Ceran Saint Vrain for this grant, also made a warranty deed to J. W. Lewelling, for a tract "lying upon the Rio Las Animas or Purgatoire river, and comprising one mile of the valley of said river, and being described as sections twenty-nine (29) and thirty (30) under the survey of Thomas Means, made in August, 1863, *the field notes of which survey are on file in my office*, said peace or parcel of land containing two hundred and thirty (230) acres," &c. (See deed, Transc., 442.) The deed falsely recites that Ceran St. Vrain was the "*principal* owner and proprietor of a certain grant or parcel of land situated in the Territory of Colorado, and known as the Las Animas grant, made by the Mexican government to Ceran St. Vrain and Cornelio Vigil by *deed of grant* bearing date the ninth day of December, A. D. 1843, and *duly confirmed to the same and to their assigns and legal representatives by the surveyor general of New Mexico, on the 21st day of November*, A. D. 1857," &c. The tract thus conveyed is on the Las Animas river, about 18 miles below Trinidad. (Bransford's testimony, Transc., 440.) Complainant's lower line is on that river, 9 miles below Trinidad. (Transc., 433.)

These 2 deeds by Craig practically admit that the Las Animas valley is in the Las Animas grant; that Calvin Jones' evidence is substantially true in stating that he surveyed the grant in 1863 with Colonel Means and found complainant's claim to be in the grant; and that Craig had the custody of Means' field notes and would have produced them had they not tended to

show complainant's claim to be in the grant. Means' survey is not official and hence is not conclusive; but, as he is dead, (Transc., 436,) his notes and map, like oral evidence, would have been admissible *to show where the east line of this grant is*, (Conn *v.* Penn, Pet. C. C., 496,) especially as they were *adopted* by appellant, and presumably by his alleged principal Ceran Saint Vrain. (1 Metc., Mass., 378; 7 Pick., 274; Bouv. Dict., "Boundary.") These deeds of Craig also admit, in effect, that no formal partition was needed to enable Saint Vrain to dispose of his $\frac{1}{6}$ of the grant, though that share was not defined by any actual settlement of Saint Vrain and was not, in fact, within the protection of the acts of 21 June, 1860, and 25 February, 1869; (and so, likewise, the whole of Craig's title to his own claim rests on deeds not supported by any previous partition. Transc., 194 *et seq.*) Much less, then, was formal partition needed to define complainant's claim; for *it was located by his settlement* and was hence practically exempted, by act of 1869, from formal partition. It seems that Felipe Baca and J. W. Lewelling who thus bought of Craig as agent, are not among the derivative claimants before Stanton and Cook. (*Id.*, 184–5–6.)

Besides the preceding evidence showing that complainant's claim is in the grant, there is a denial by Craig of his counsel's assumption that it is out of the grant. That claim is shown by plats A, B, C and D, forming Exhibit No. 2. (Transc., 284–5.) There is no doubt that Exhibit No. 2 means those plats. (*Id.*, 302, *308*, *317*.) Now, when Craig was sworn he was shown Exhibit No. 2, and said:—I know the Las Animas from source to mouth. I know nothing of township, range or section and therefore know not what this map represents. "I know where Thomas Leitensdorfer lives on the Purgatoire river; know where Trinidad is and the principal points above and below." (*Id.*, 319.) After that he was asked—"Was the land described in Exhibit No. 2 at the time of which you speak regarded as being included within the limits of the Las Animas grant?" He answered:—"If Exhibit No. 2 represents that portion of the Purgatoire to which I have referred, it was." (*Id.*)

The papers forming the original grant consist with the theory that the Las Animas Valley is in the grant. The petition of Vigil and Saint Vrain for the grant (Transc., 251) was, as usual, indefinite. So were the governor's order for juridical possession, the petition of the grantees for the enforcement of the order, and the approval of that petition by Justice Sanchez. (*Id.*, 252.) To ascertain the grant one must therefore look to the act of juridical possession. That instrument (*id.*, 253) says: "We proceeded to the establishment of the mounds (mohoneras) for the boundaries as described in said foregoing petition *and corresponding with the plat*, to which I attached my rubric, and commencing on the line

(north of the lands of Beaubien and Miranda) at one league east of the Animas river a mound was erected; thence following *in a direct line to the Arkansas river*, one league below the junction of the Animas and the Arkansas, the second mound was erected on the banks of said Arkansas river, and following up the Arkansas to one and one-half league below the junction of the San Carlos river the third mound was erected; thence following in a direct line to the south," &c. (Transc., 253.)

This description, read with the deseño, (Transc., 346–7,) shows that the valley of the Las Animas or Purgatoire river, from the north line of Beaubien and Miranda to the Arkansas, is in the grant; otherwise it would have appeared, from the description and the *deseño* that Sanchez crossed and recrossed the river, for he began and ended the lower line of this grant a league eastward of the river. The north line of Beaubien and Miranda was known on the 2 January, 1844, when possession was thus personally delivered to Cornelio Vigil and Ceran Saint Vrain; for, on the 22 February, 1843, Vigil, who joined in receiving this possession, had delivered the juridical possession in the case of the Beaubien and Miranda grant, attended by *Pedro Valdez*, one of the attendants of Sanchez in delivering the possession in the case of the Las Animas grant. (See public, printed doc. entitled "Private Land Claims. New Mexico. I. General Land Office," p. 361.) Moreover, the U. S. have since patented the Beaubien and Miranda grant, (12 Copp's Land Owner, 99; 2 Decis. of Int. Dept. on Pub. Lands, 591;) and the patent, whose lines appear on the commissioner's maps of the U. S and Colorado, remove all "doubt as to the boundaries of the tract." (Morrow *v.* Whitney, 95 U. S., 551, *555*.)

Those maps also show the boundaries of the grant of 1 December, 1843, to Gervacio Nolan, which forms the upper or western line of the Las Animas grant. (See plat of latter, Transc., 346–7; and see Nolan grant discussed, Colorado Co. *v.* Commissioners, 95 U. S., 259.) Probably the Las Animas grant extended from the Las Animas valley inclusive, below, to the lower line of Nolan, above, and from the Arkansas, in front, to the grant of Beaubien and Miranda, and the grant of Charles Beaubien (for which see Tameling *v.* U. S. Freehold Co., 93 U. S., 644,) behind.

The "direct line" bounding the Las Animas grant on the lower or S. E. side, as described in the act of juridical possession and drawn on the deseño, does not mean *una linea recta*, although such are the words in the Spanish original. (Transc., 250.) *Qui haeret in litera haeret in cortice.* "The meaning of particular words, indeed, in acts of Parliament, as well as in other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion in which they are used, and the object that is intended

to be attained." (Broom's Max., 536.) Thus, if a lessee covenants to leave all the timber which was growing on the land when he took it, the covenant will be broken, if, at the end of the term, he cuts it down, but leaves it there. (*Id.*, 534–5.) No man can actually run a straight line 140 miles long through the torrents and thickets, and up and down the cliffs, inseparable from a mountainous land like that in this grant. Much less can it be done by a man who was not a surveyor, and had no instruments, and does not pretend to have measured or marked a line of the grant. The whole value of the tract at the time would probably not have paid the cost of measuring and marking a true *linea recta* from the N. E. corner of Beaubien and Miranda to the mouth of the Las Animas, even had such a labor been practicable or necessary.

The bounding line of Beaubien and Miranda, on the deseño of the Las Animas grant, is shown as a *linea recta* running east and west; and yet the commissioner's maps of the U. S. and Colorado, showing that line as patented by the U. S., prove that it is far from a straight line or a true geographical parallel. So, in the Charles Beaubien claim, justice Sanchez, (who, on the 2 January, 1844, had delivered the possession in the Las Animas grant,) delivered the possession on the 12 January, 1844, thus: "commencing on the east side of the Del Norte River, a mound was erected *at one league distance from its junction with the Costilla River*, thence following up the Rio Del Norte, on the same eastern bank, *to one league above the junction of the Trenchera river*, where another mound was erected; and continuing from west to northeast, *following up the current of Trinchera river* to the summit of the mountain, where another mound was established," &c. (Tameling *v.* U. S. Freehold Co., 93 U. S., 644, *648*.) Now, "following up the current of Trinchera river" means, literally, to wade up stream like a man fishing for mountain trout with a fly; but, as the wading began a league above the stream, it is plain that the words quoted must not be literally rendered; and, looking at the commissioner's map of Colorado, which shows this boundary as patented, it appears that the true boundary is a right line, which does not touch the Trinchera but runs several miles from it, and parallel to its general course, so as to include the stream and its main tributaries.

In 1844, before mining had grown into an established industry in the part of the republic of Mexico containing the above grants, the region was only deemed valuable for grazing and agricultural purposes. Vigil and Saint Vrain asked for their grant because they wanted "sufficient fertile land for cultivation, an abundance of pasture and water, and all that is required for a flourishing establishment and for raising cattle and sheep," &c. (Transc., 252.) The Beaubien and Miranda grant, the Charles

Beaubien grant and the Gervacio Nolan grant, were doubtless sought for the same general ends. Hence it was that these grants were so delivered by the justice of the peace as to embrace the chief streams in their vicinity. Irrigation is essential in that country, and the valleys of streams constituted the value of the grants. In the Nolan grant, therefore, the lower side line began on the Arkansas 1½ leagues below the mouth of the San Carlos, whose valley was in the grant. (Deseño, Transc., 347.) In the Charles Beaubien grant, the lower line ran from the left or eastern bank of the Rio Grande del Norte a league below the mouth of the Costilla creek, and the upper line left the Rio Grande del Norte, on which the grant fronts, a league above the mouth of the Trinchera river. The commissioner's map of Colorado shows that these two grants respectively embrace the tributaries mentioned here. So, his map of New Mexico shows that the Beaubien and Miranda grant embraces nearly all the head waters of the Canadian river.

It is therefore a reasonable presumption, that when Justice Sanchez began the lower or S. E. line of the Las Animas grant on the north line of Beaubien and Miranda a league east of the Las Animas river, and ended it on the Arkansas a league below the mouth of the Las Animas river, he meant that the whole Las Animas valley should be in the grant. The name of this grant sustains this conclusion. And no doubt Sanchez, in like manner, would have embraced the San Carlos valley in this grant had the valley not been previously appropriated to Nolan. This conclusion respecting the extent of the Las Animas grant derives strength from the deseño. For that document embraces the whole valley of the Las Animas river from its mouth to the north line of Beaubien and Miranda; and the lower or S. E. line of the Las Animas grant, on the deseño, *is about parallel to the main stream of the Las Animas*, cutting, and excluding from the grant, an eastern tributary of that river which joins the river at a point on its eastern bank midway between the N. E. corner of Beaubien and Miranda and the mouth of the river, and is probably the stream called Chicaquaqua creek on the commissioner's map of Colorado.

It follows, that if complainant lived on the Las Animas or Purgatoire river between its mouth and the Beaubien and Miranda grant, he lived on the Las Animas grant. But that his land is on the Las Animas river, between those limits, is shown by all the proof and admitted by Craig. (Transc., 319.) Mountain streams have many tributaries. One affluent cannot form a river. Many affluents must converge to produce it. Hence the Las Animas has many sources. Which makes the main stream is doubtful, and the doubt increases as we ascend, until the river is lost in a multitude of small feeders. This fact has caused much con-

flicting testimony as to the point where the main Las Animas, in its general north-easterly course, crosses the northerly line of Beaubien and Miranda. But the doubt does not affect this case, for the Las Animas is well defined by the time it reaches complainant's settlement.

Such is the rational view of the meaning of justice Sanchez when he bounds this grant on the lower or S. E. side by "a *direct* line to the Arkansas river." The grant should not be distorted to fit the literal meaning of the word *recta* or *direct*. *Aucupia verborum sunt judice indigna*, said that great judge Sir Henry Hobart. Lord Coke said, who sticks to the letter sticks to the bark, and legal niceties are not laws; that words are to be interpreted according to the subject matter; that they ought to wait upon the intention, not the reverse, and are always to be taken in their milder sense. Chancellor Kent said that terms of art should be explained from the art. Calvinus said that words are to be understood in reference to a possible case; that it is better they should have no operation than to operate absurdly; that they are not to be looked at so much as the cause and nature of the thing; that you may disagree with words, nay, you may recede from them, in order that they may be reduced to a sensible meaning; that they should be received most favorably to the thing and the subject matter; that words of a strict signification can be given a wide signification if reason require, and that there is no one who is ignorant that words should be understood according to the subject matter. Lord Bacon said, words are to be so understood that the subject matter may be preserved rather than destroyed. And Spiegelius said, words, however general, are restrained to fitness (*i. e.* to harmonize with the subject matter) though they would bear no other restriction. "In the construction of statutes the land department, like courts of justice, hold that a thing within the letter is not always within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter." (Spaulding on Pub. Lands, § 618, and cases there cited.)

This is a question of boundary, and the cases on that question enforce the above general rules of construction, and show that this grant, reasonably construed, embraces the Las Animas valley, if the *deseño* be taken as Sanchez intended it, *i. e.*, as explanatory of his field operations. And here it is admitted that, whilst the *deseño* embraces, as part of this grant, the whole Las Animas valley, from the north boundary of Beaubien and Miranda to the Arkansas, a true right line, run from any point on that boundary to a point on the Arkansas a league below or east of the confluence of the Las Animas, would cut the latter stream and so exclude part of its valley from this grant.

The act of juridical possession, and the deseño, viewed together, show the Las Animas valley to be the *principal call* as regards the lower or S. E. line of the grant, the sole line in controversy. But "all subordinate calls in an entry must yield to a principal call to which they may be repugnant. If a great and prominent object, immoveable and durable in itself, and of general notoriety, be called for in a location, that object must fix and locate the entry, although other minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator intended to take other land." (Finley *v.* Williams, 9 Cr., 164, *168–9*, by Marshall, C. J.) "*It may be laid down as an universal rule, that course and distance yield to natural and ascertained objects.*" * * *

"We must consider that the construction of the patent is somewhat doubtful. That it is susceptible of two constructions, each of which has some reasons to support it. If it be doubtful, it would seem reasonable not to press the broadest construction against a party who is now in actual possession under a perfectly good legal title." (Preston *v.* Bowmar, 6 Wheat., 580, *582*, by Story, J.)

We hold that this grant covered the whole vacant country fronting on the Arkansas, from the Las Animas river including its valley, to the San Carlos excluding its valley. Now, "The territory lying between two rivers, is the whole country, from their sources to their mouths; and if no fork of either of them has acquired the name, in exclusion of another, *the main branch to its source must be considered as the true river.*" (Doddridge *v.* Thompson, 9 Wheat., 469, *473*, by Marshall, C. J.) The words of the same great man in Newsom *v.* Pryor, (7 *id.*, 7,) describe the Las Animas grant, and are an argument for complainant.—

"It is apparent that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a platt, which he supposed would comprehend the land intended to be acquired. It is now too late to question the validity of grants made on such platts and certificates of survey. From the extraordinary circumstances of the country, they were frequent, and, in consequence of those circumstances, have received the sanction of courts. An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle, cannot be perceived; and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had been actually made.

"In consequence of returning platts where no actual surveys had been made, and where the country had been very imperfectly explored, the description contained in the patent often varies materially from the actual appearances of the land intended to be acquired. Natural objects are called for in places

where they are not to be found; and the same objects are found where the surveyor did not suppose them to be. In a country of a tolerably regular surface, no considerable inconvenience will result from this circumstance. The course and distance of the patent will satisfy the person claiming under it, and seldom interfere with the rights of others. But in a country where we find considerable water courses and mountains there must be more difficulty. The surveyor calls for some known object, but totally miscalculates its courses, distances, or both, from some given point which he has made the beginning of his survey; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is to run south 894 poles, to a stake, crossing the river. This distance will not reach the river; and must be continued to 1,222 poles, to cross the river. The distance must be disregarded, and this line so extended as to cross the river, or the distance must control the call for crossing the river.

"These difficulties have occurred frequently, and must be expected to occur frequently where grants are made without an actual survey. Some general rule of construction must be adopted; and that rule must be observed, or the conflicting claims of individuals must remain forever uncertain.

"The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. It is, that the most material and most certain calls shall control those which are less material, and less certain. *A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance.* These decisions are founded on two considerations. Generally speaking, *it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land;* and, in every case where a natural object is mentioned, it designates the land surveyed had there been an actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake crossing the river. Now, it is much more probable that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river." (Newson *v.* Prior, 7 Wheat., 7, *8–9–10.*) This is deservedly a leading case on questions of boundary, and is relied on in Brown *v.* Huger, 21 How., 305, *321;* Higueras *v.* U. S., 5 Wall., 827, *836;* County St. Clair *v.* Lovingston, 23 *id.*, 46, *62.*

In M'Iver *v.* Walker, (9 Cr., 173,) which was ejectment, the certificate of survey and the patent, of defendant, ignored Crow Creek; and the courses and distances called for in them would have excluded all of the creek and the land in defendant's posses-

sion. *But the patent referred to a plat annexed, which laid down the creek as passing through the patented tract.* This court, by Marshall, C. J., reversed the judgment below which had been against McIver, the defendant there, and *directed that the grant be so run as to include Crow Creek, and to conform as near as may be to the* PLAT ANNEXED *to the said grant.* Said this court, (Duvall, J., dissenting,) after stating the rule that, if water courses, &c., be called for, "distances must be lengthened or shortened, and courses varied so as to conform to those objects;—"

"The laws of the state require this annexation. In this plat, thus annexed to the patent and thus referred to as describing the land granted, Crow Creek is laid down as passing through the tract. Every person having knowledge of the grant, would also have knowledge of the plat, and would, by that plat, be instructed that the lands lay on both sides of the creek. There would be nothing to lead to a different conclusion but a difference of about five degrees in the course, should he run out the whole chain of surveys in order to find the beginning of No. 12; *and he would know that such an error in the course would be corrected by such a great natural object as a creek laid down by the surveyor in the middle of his plat.* This would prove, notwithstanding the error in the course, that the lands on both sides of Crow Creek were intended to be included in the survey, and intended to be granted by the patent." (M'Iver *v.* Walker, 9 Cr., *178, 179.*) These views were affirmed when the case came up again. (McIver *v.* Walker, 4 Wheat, 444, *452.*) The case in 9 Cr. is also relied on in Croghan *v.* Nelson, 3 How., 187, *193.*

If Chief Justice Marshall, therefore, is a safe guide, the Las Animas grant should be so run as to include Las Animas valley, and to conform as near as may be to the plat annexed to the act of juridical possession; in which case complainant's claim would be found to be in the grant.

Craig's brief, on p. 28, quotes from the deposition of Albert W. Archibald, saying it was filed by complainant, on his own behalf. The truth is, Archibald was a witness against Leitensdorfer, (Transc., 322,) and his evidence was part of the general transcript of complainant's case, as certified by the commissioner and offered in the court below by Leitensdorfer (*Id.*, 235, 115,) as an impartial presentation of his case. The act of juridical possession says that the lower or S. E. line of this grant runs to the Arkansas from a point *on the north line of Beaubien and Miranda* one league east of the Las Animas river. Craig's brief, pp. 29 and 30, construes Archibald as saying that this point is in "the middle of the north line" of T. 34 S., R. 66 W.; but Archibald did not say so. His testimony was, that the point "is near the *centre*" of that township; (Transc., 322;) and even this testi-

mony is not reliable, for the commissioner's map of Colorado shows that the north line of Beaubien and Miranda passes about 3 miles north of the center of the township mentioned.

## Reply to Appellant's Fifth Point.

Appellant's brief, on p. 32, says this suit cannot be maintained because, before it began, complainant's interest had ceased to be his property, or that of Eugene Leitensdorfer or Josephine Farnsworth; and on p. 34 the brief alleges that Thomas Leitensdorfer's interest, is, according to the record, vested in Spence M. Baird's heirs.

Appellant begins the argument of his 5th point with the allegation that the donation of 7 March, 1844, from the grantees to Eugene Leitensdorfer, "provides that said Vigil and St. Vrain may, *at pleasure*, give any lands in the grant to colonists for settlement thereon." (Craig's brief, p. 32.) This is not true. The future gifts to colonists could not be made without Eugene Leitensdorfer's assent; the donation provided that those gifts were to be made "under such stipulations and such arrangements as both parties may agree upon," &c. (Transc., 287.)

Craig's brief, on p. 32, concludes that "If gifts could be made to colonists, it would seem to follow that sales also of lands could be made to them." This is not a just conclusion. It appears from the petition for this grant, (Transc., 252,) and from the deed to Eugene Leitensdorfer, that early colonization was the express object of the grant, and this object would have been defeated had the grantees, themselves the recipients of a governmental bounty, converted it into a speculation at the expense of the colonists. Therefore the deed provided for gifts to families afterwards settling on the grant, but not for sales.

"In his original bill (R., p. 13)," says Craig's brief, "he claims to be acting on behalf of himself and of others, who, according to his statement, on the 11th (MS. p. — of his original bill), claim 40,000 acres, would thus take precedence of the plaintiff's claim," &c. (Craig's brief, p. 32–3,) When the grantees made the donation of 7 March, 1844, to Eugene Leitensdorfer, all the owners, namely, the grantees, Leitensdorfer and Manuel Armijo, (Transc., 170,) were tenants in common; and the right to make future gifts to colonists probably referred to future donations of the undivided grant. But it does not follow that the grantees retained the right to dispose of Thomas Leitensdorfer's derivative claim; for under the act of 25 February, 1869, that became his separate property. Besides, Eugene Leitensdorfer never *agreed* to any such disposition. Nor does it appear that any appealing derivative conflicts with Thomas Leitensdorfer's claim, or has a title founded on a *gift agreed* to by Vigil and Saint Vrain and Eugene Leitensdorfer.

"While the title to the Leitensdorfer interest was held by S. M. Baird," says Craig on p. 33 of his brief, "a very large share of it passed to others by deeds, as follows," &c. The 4 deeds thus cited are in the Transcript, p. 200, 206, 208, 202. They cover but 3 miles of the narrow valley of the river Huerfano, a small tributary of the Arkansas, many miles distant from the Las Animas valley, *and form no part of appellee's claim.* The deed of 5 November, 1859, from Ceran St. Vrain and S. M. Baird to Mrs. Anna Caroline Houghton, (Transc., 200,) is a mere quit claim "of undivided interests" in 2 miles of the Huerfano valley, showing that the title of Craig, who afterwards bought her out, is not founded on actual partition. Of the 2 deeds for this land from Mrs. Houghton to Craig, that for ½ a mile of the valley, (*id*, 206,) is an express quit claim, and that for the remaining 1½ miles of the valley only warrants the title against herself and her heirs and assigns. (*Id.*, 208.) The deed to Craig of 1 July, 1860, by Joab Houghton, as agent of Saint Vrain and Baird, and others, is an express quit claim for a mile of the Huerfano valley. (*Id.*, 202.)

It is said by Craig's brief, p. 33, that before this suit began *many thousand acres of the sixteen thousand claimed by complainant before Stanton and Cook, were conveyed to the U. S.* These conveyances were mere relinquishments, and are explained on p. 37–39 of our brief for appellee filed on the 9 October, 1886. Appellee's home is on the N. W. ¼ of s. 24, T. 32 S., R. 63 W., (Transc., 311,) and his improvements, worth $1,000, (*id.*, 433,) are on the N. ½ of s. 24, and the conterminous S. W. ¼ of sec. 13. (*Id.*, 317.) His derivative claim covers the W. ½ of s. 13, and all of secs. 22, 23 and 24, (Transc., 284–5, plat A,) and many other lands; and the tracts thus specified, containing 2,240 acres, have never been relinquished. Our former brief, p. 38, shows that when this suit was filed appellee's claim embraced at least 9,960 acres not relinquished, whereas, to sustain the bill, a value of $500 sufficed. (Act 3 March, 1875, s. 1, 18 Stat., Part 3, p. 470.) But, as explained on p. 39 of our former brief, the matter in dispute in this suit is Craig's claim. The bill asks the court to cancel Craig's title, not to establish Leitensdorfer's; and it is not to be denied that the value of Craig's claim suffices to give jurisdiction to this court, and, *a fortiori*, to the court below. Said Chief Justice Waite, delivering the opinion in Hilton *v.* Dickinson, (108 U. S., 165, *174*,) "it has always been assumed, since *Cooke v. Woodrow, supra*, that when a defendant brought a case here, the judgment or decree against him governed our jurisdiction," &c.

"And after the Leitensdorfer claim had been submitted to the Register and Receiver for decision," says Craig, on p. 33–34 of his brief, "*one-half the claim was sold through the agency of the Receiver, Cook, nominally to Joseph S. Adams, the deed,* properly executed,

was placed in the hands of the receiver, with the promise on his part *to return the deed to the grantor, or the $25,000 named in said deed*, to be equally divided between John Hallum and Thomas Leitensdorfer. The deed was not returned, but was recorded."

The deed here mentioned was intrusted to the receiver by John Hallum, appellee's counsel at the time; and, by the statement just quoted, Craig's counsel intimate, what is plainly alleged in his answer, (Transc., 69,) that the whole transaction was an attempt "to bribe the said register and receiver," &c. This charge in Craig's answer is considered on p. 33–35 of our brief of 9 October, 1886. As to the insinuations quoted above from Craig's brief, it may be added here that no sale, nominal or otherwise, was made to Adams. The only evidence touching the alleged sale is Hallum's testimony. Respecting the property to be sold, he swore "Mr. Cook told me that Adams had declined to take it." (Transc., 85.) Nor is it true, as alleged by Craig's brief, that Cook promised "to return the deed to the grantor, *or* the $25,000 named in said deed." Cook represented to Hallum that "if he, Adams, did not take the property and pay for it, then he, Cook, would return the deed to me." (Hallum's testimony, Transc., 85.) Craig's brief, p. 34, ends the matter with the remark that "If the receiver failed to pay over the $25,000, as he had agreed, he simply remained indebted in that sum. (Hallum's deposition, R., 84.)" This inference is not sustained by the facts. The land was not sold, to any one. If Adams had taken the property, and paid Cook for it, Cook would then have owed the former owners the price received by him; but the sole proof about the matter shows "that Adams had declined to take it," (Transc., 85,) and that in fact no such man existed. (*Id.*, 85–6.)

This deed was an escrow. Hallum left it with Cook to be delivered to Adams on the payment by Adams to Cook of $25,000 cash. This condition was never performed. "No consideration whatever was ever paid in any way, shape, manner, or form for this escrow," said Hallum. (Transc., 85.) But, "An escrow has no effect as a deed till the performance of the condition; 21 Wend. 267; and takes effect from the second delivery; 1 Barb. 500." (Bouv. Dict., "Escrow.") Here, had the deed been delivered to Adams, it would have been void for non-performance of the condition on which it had been first delivered by Hallum to Cook; but it was never delivered to Adams. Cook, since dead, told Hallum "that it was in his safe at Denver;" (Transc., 85;) and he promised to get and return it to Hallum, (*id.*,) which itself presumes that there was no sale. There was no sale also, because a buyer is essential to that contract, and here there was no buyer. Adams did not exist. But, if he had existed, and the deed had been delivered to him by Cook, or even by the owners of the land, the deed would have been void for want of consideration.

(2 Bla. Com., 445; Bouv. Dict., "Consideration" and "Nudum Pactum.") A deed under seal imports consideration; but Hallum's deed is not in the record, and it does not appear whether it was under seal or not. Though Craig's answer avers (Transc., 69,) that this deed was an attempt to bribe Stanton and Cook, he neither offered Stanton to prove the attempted bribery, or the deed to prove itself. All that is known of the deed is Hallum's evidence about it, which he qualifies by the statement that no consideration passed for the deed. And this statement must now be taken as established; for what is proved by parol alone, may be explained by parol alone. If Hallum's transaction with Cook was undertaken by Hallum with intent to influence the decision of Stanton and Cook, Hallum was guilty of an infamous offence. (R. S., § 5451, and statutes there cited.) And if Eugene Leitensdorfer, who, like Hallum, seems to have been a general agent of complainant, took part in the transaction, he too was guilty. But, as the attempt at bribery, if it ever occurred, was not within the scope of the authority of those agents, and was not known to complainant or authorized or ratified by him, he is not at all responsible for it, legally, criminally or equitably. "The principal is never criminally answerable for the act of his deputy; they must each answer for their own acts, and stand or fall by their own behaviour. To affect the superior criminally by the act of his deputy, there must be the command of the superior for the act in question." (Paley's Agency, 230, 2d Amer. ed., and cases there cited.) For all the purposes of this suit the deed to Adams has no more effect than if it had never been written. It has never existed in law.

But, on p. 34 of Craig's brief, he says that complainant, in 1867, conveyed all of his interest in this grant to Spence M. Baird, and that "the same, so far as this record shows, is still vested in the heirs of said Baird." This surmise is not sustained by the record. On the 24 February, 1850, Eugene Leitensdorfer, being in embarrassed circumstances, executed to Spence M. Baird, without consideration, a deed for his $\frac{1}{6}$ interest in this grant. The deed is not in the transcript, but is mentioned by Eugene Leitensdorfer. (Transc., 286.) After that, on the same day, Baird gave Leitensdorfer a power of attorney to sell the property, or lease it and collect the rent, and to collect other demands owing to Baird, &c. (*Id.*, 295.) On the 10 December, 1861, Leitensdorfer, for himself and as Baird's agent, made, for $1,200 cash, a deed to complainant of all of the vendors' interest in the Las Animas grant. (*Id.*, 292.) In 1867, complainant, being involved a little, made a deed to Baird, without consideration, for the $\frac{1}{6}$ of the grant, reserving 10 acres. The evidence of the deed is the statement of complainant. (*Id.*, 312.) But, on the 22 May, 1872, Eugene Leitensdorfer again, for $500

cash, for himself and as Baird's agent, made a deed conveying all their interest in the grant, to complainant. (*Id.*, 294.) Baird died about the 5 June, 1872, (*id.*, 314,) and on the 23 October, 1872, complainant filed his derivative claim with Stanton and Cook. (*Id.*, 285.)

Craig's brief assumes that Baird's power to Eugene Leitensdorfer of 24 February, 1860, became *functus officio* by the agent's deed of 10 December, 1861, to complainant; so that complainant's deed to Baird of 1867 permanently conveyed to Baird $\frac{1}{6}$ of the grant, and Eugene Leitensdorfer's deed of 22 May, 1872, to complainant, conveyed no interest. The brief of appellant, on p. 36, also says that Baird's power is not proved, because the original was not produced or accounted for, and because there is no proof of Baird's signature to the original, or of any acknowledgment of the original by him.

These objections of Craig will now be considered.

*Baird's power to Eugene Leitensdorfer did not become* functus officio *by the agent's first sale.* It was a very general power to take possession of all "real estate whatsoever in the State of Missouri and the Territory of New Mexico whereof I *may in any way* [be] entitled or interested;" to sell all or part of it on such terms as the agent might think right, and make deeds for the same with or without warranty, and, until sale, to let the same for the best rent that can be had; to collect all sums to become due under such sales and leases, or to compound for the same; to "receive all such sums of money, debts, rents, goods, wares, dues, and accounts *and other demands whatsoever which are or shall be due or owing, payable, and belonging to me,* or detained from me in any way or manner, or ways or means whatsoever, by any person whomsoever;" and generally all things whatsoever needful to be done in the premises, to do and execute as amply, to all intents, as I might if personally present, "*or, as the matter required more special authority than is herein given,* hereby ratifying," &c. (Transc., 295–6.) This power was signed, sealed and delivered by S. M. Baird, before William J. Floyd as subscribing witness; the original was recorded 1 June, 1872, in Las Animas county, Colorado, before Baird's death; a copy was certified from the record, by the recorder, on the 3 February, 1873; and this copy, on the 18 February, 1873, was filed, as one of the proofs in appellee's claim, with Register Stanton. (*Id.*, 296–7.)

This is just such an omnivorous power to sell, lease, and administer property, as a nominal owner would probably give to the real owner, to enable the latter to continue the management of his own affairs. It does not specify any property, nor is it limited to Baird's present property; but it relates, says Baird, to any land in Missouri or the then territory of New Mexico, "whereof I may in any way [be] entitled or interested." His words are not

*whereof* I AM *in any way entitled or interested.* The word *may* embraces the future, and is in harmony with the generality of this power and with the acts of the parties. It is provided in art. I, sec. 2 of the constitution, as it read before the 14th amendment, that "Representatives and direct Taxes shall be apportioned among the several States which *may be* included within this Union, according to their respective numbers," &c. (R. S., p., 18.) Here is a constitutional exposition of the word *may;* a practical declaration by practical men that the word embraces the present and future.

Eugene Leitensdorfer, on the 24 February, 1860, without consideration, for his own convenience alone, made a nominal deed of his land to Baird, who afterwards, on the same day, made to Leitensdorfer the power in question. As neither Baird or his heirs ever claimed, before the register and receiver, the land in complainant's derivative claim, the presumption is that the beneficial interest in it remained in Eugene Leitensdorfer notwithstanding the deed; and this presumption is supported by the latter's testimony, and by the fact that he made the deeds of 10 December, 1861, and 22 May, 1872, to complainant "*for himself* and as attorney-in-fact for S. M. Baird," (Transc., 292, 294.) Had Eugene Leitensdorfer been only Baird's agent, he would not have used these words: his testimony is clear that his deed to Baird of 24 February 1860, was made, without consideration, to protect his own interest. (Transc., 286.)

Hence the power to Eugene Leitensdorfer was *a power coupled with an interest* in the land afterwards twice conveyed, under the power, to complainant. The interest of Eugene Leitensdorfer was an interest in the land, and not merely in the proceeds of its sale. Such a power, so far from being revoked by any sale under it, could not have been revoked even by Baird's death had that occurred before the second sale to complainant. (Story's Bailments, § 205; Story's Agency, § 488, 489; Boone *v.* Clarke, 3 Cranch C. C., 389.) "This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death." (Hunt *v.* Rousmanier, 8 Wheat., 174, *203, per* Marshall, C. J.)

*This power, therefore, was a continuing power; for such is the meaning of its words, and it was a power coupled with an interest.*

The deed of 24 February, 1860, from Eugene Leitensdorfer to Baird, and the deed of 1867, from Thomas Leitensdorfer to Baird, are not in the record. But, if valid, they created resulting trusts in favor of their respective grantors, "and in all cases where there is a resulting trust," it may be established by parol. (Babcock *v.* Wyman, 19 Howard, 289, *300;* cited, Jackson *v.* Lawrence, 117 U. S., 679, *681.*) In truth, as Craig did not try to

prove those deeds, and they were established solely by the candid, parol testimony of their grantors, the deeds of course could be qualified by like testimony; for "he that institutes may also abrogate, most especially when the institution is not only by, but for himself;" (Sydney's Discourse concerning Government, p. 15;) and *verborum obligatio verbis tollitur, nudi consensus obligatio contrario consensu dissolvitur.* (Digest, 50, 17, 35; Broom's Max., 686.) Now, the deed of Eugene Leitensdorfer to Baird, as well as that of Thomas Leitensdorfer to Baird, was without consideration, (Transc., 286, 312,) and was therefore a *nudi consensus obligatio;* for "*Nudum pactum* is where there is no consideration for the undertaking or agreement." (Digest, 2, 14, 7, § 4; Bouv. Dict., "Maxim.") But, *ex nudo pacto non oritur actio.* (Code, 2, 3, 10; 5, 14, 1; Broom's Max., 583.) "A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law." (2 Bla. Com., 445.) It is void, for "Consideration is of the very life and essence of a contract." (Bouv. Dict., "Consideration;" and see *id.*, "Nudum Pactum.")

There are cases where the instrument itself presumes consideration, as notes, bills, and specialties or contracts under seal; but nothing is known of these two deeds save by parol, and that evidence does not show that the deeds were under seal, or recorded, but does show that they were made without consideration. They were therefore void,—void as against the creditors of Eugene and Thomas Leitensdorfer and void as conveyances to Baird. It follows that complainant's interest is not "vested in the heirs of said Baird," as alleged on p. 34 of Craig's brief. The nullity of the deeds is another reason why Baird's power to Eugene Leitensdorfer should be sustained as a continuing power. Courts always lean in favor of the execution of a power, if it can be supported. (Warner *v.* Howell, 3 Wash. C. C., 12; Segee *v.* Thomas, 3 Blatchf., 11.) As an unquestionable settler under act of 25 February, 1869, and as a derivative claimant under Vigil and Saint Vrain, Thomas Leitensdorfer rightly invokes a liberal construction of his paper title. Possibly the acts of 21 June, 1860, and 25 February, 1869, required that he should, besides proving his settlement, produce the mesne conveyances through which he derived his title; *but, if so, the requirement was made simply to enable the executive department "to determine if there was a bona fide claimant before it under a Mexican grant."* (Castro *v.* Hendricks, 23 How., 438, *442:* and see U. S. *v.* Percheman, 7 Peters, 51, *97;* U. S. *v.* Patterson, 15 How., 10; U. S *v.* Sutter, 21 *id.*, 170, *182.*) Complainant's paper title may not be perfect. He does not ask the court to declare or make it so. He only asks to be allowed to prove his case before the commissioner and secretary.

But Craig's brief says, on p. 35, that the deeds of Eugene and Thomas Leitensdorfer to Baird were made in fraud of creditors. If so, this is one more ground for holding the deeds void. This court, however, cannot consider the rights of creditors in this action. Their rights must be enforced by themselves. The deeds did not hurt Craig, and *actio non datur non damnificato.* Any creditor of Eugene Leitensdorfer or of complainant, having a right to the latter's land, will be benefitted by this suit if successful; for, if the suit succeeds, Thomas Leitensdorfer's appeal, now before the interior department, will be tried, and his claim, now defenceless, will be confirmed, *and the confirmation must enure to the true owner of the soil.* (Lessee of French *v.* Spencer, 21 How., 228, *239–40.*) Complainant, at his own cost, is perfecting his title for the benefit of whom it may concern. It is not possible that any creditor whatever of Eugene or Thomas Leitensdorfer can be hurt by such a proceeding. But there is no evidence that, on the 23 October, 1872, when complainant filed his claim before Stanton and Cook, either he or his brother Eugene was in debt. Complainant's resumption of his property, in his own name, by the deed of 22 May, 1872, from Eugene Leitensdorfer acting for himself and Baird, rather implies that complainant, at least, was once more free from debt.

It is wrong, though common, for a failing man to mask his land from creditors; but Craig is not in position to criticise the wrong. On the 20 January, 1866, as Ceran Saint Vrain's general, resident agent for the Las Animas grant, he sold a tract on the Las Animas or Purgatoire river, to J. W. Lewelling, for a "valuable consideration" (probably $1,600,—see Transc., 220,) alleging in the deed (*id.*, 442,) that the Las Animas grant had been "duly confirmed" by the surveyor general to Vigil and Saint Vrain, and to their assigns and legal representatives; whereas that officer had no power to confirm, (public act, 22 July, 1854, s. 8, 10 stat., 308,) and the public act of 21 June, 1860, s. 2, (12 stat., 71,) preferred the rights of derivative claimants to those of Vigil and Saint Vrain, and required the hypothetical residue due those grantees to be located, not piecemeal on the Las Animas river or elsewhere, *but in 2 equal squares within the grant.* But *no* location has ever been made. Besides, "there is no residuum for the original grantees." (Brief for appellant of 5 October, 1886, p. 19.) If it is bad to circumvent one's creditors, it is worse to circumvent a purchaser for value.

The legal effect of the successive deeds, &c., involved in Craig's fifth point, was as follows.—Eugene Leitensdorfer's deed of 24 February, 1860, to Baird, having been made without consideration and to evade creditors, was null, and does not exist in law. Baird's subsequent power to Eugene Leitensdorfer, of the same day, being, by its terms, a continuing power, and being also a

power coupled with an interest in this land, could not be revoked by Baird's death or by any act of his, but left Leitensdorfer's right and power to dispose of the land wholly untrammeled. Eugene Leitensdorfer's deed of 10 December, 1861, for himself and Baird, to Thomas Leitensdorfer, for $1,200, cash, being accompanied by an immediate transfer of possession, continuing, without intermission, till the filing of this suit and afterwards, (Transc., 420, 423,) conveyed to complainant the entire interest in his derivative claim. Complainant's deed of 1867 to Baird, being made without consideration and to evade creditors, was null, and does not exist in law. Under this deed, Baird, who had been complainant's legal adviser, (*id.*, 311,) filed a claim with the surveyor general, dated 17 July, 1869, for appellee's ranch, where Baird then lived, (*id.*, 101,) limiting the claim to 2,560 acres. (*Id.*, 375.) But appellee testified that this was done without his authority. (*Id.*, 311.) It was also without authority of law, and hence void, for the act of 25 February, 1869, had taken away the surveyor general's jurisdiction and vested it in the register and receiver exclusively. The proceeding, therefore, before the surveyor general, seems, in fact, not to have been pursued. Whatever interest Baird took under the deed of 1867, could not have exceeded that of a trustee in a resulting trust, the beneficial interest remaining in complainant as *cestui que trust*. Eugene Leitensdorfer's deed to his brother Thomas, of 22 May, 1872, for $500 cash, was made for himself and Baird, and clothed the real interest which had existed in Thomas, ever since the 10 December, 1861, with the nominal interest of Baird, who died on the 5 June, 1872, without filing any claim before Stanton and Cook for appellee's ranch. The claim before those officers was filed by Thomas Leitensdorfer, on the 23 October, 1872, when he was exclusive owner and occupant.

The acts of Baird and appellee sustain the theory that appellee continued the owner of his derivative claim from the date of the deed to complainant of 10 December, 1861, down to the filing of his claim by him. Baird was a lawyer, (Transc., 311,) and would himself have filed the claim before Stanton and Cook, under the act of 1869, had he owned it. The various relinquishments in the record, (p. 333–335,) made to the United States, were by complainant: none of them were by Baird or his heirs. Craig overhauled the relinquishments, (p. 64, *et seq.*, of "Evidence in behalf of Appellant in support of motion for rule to show cause,") and found none from Baird or heirs. The meaning of these relinquishments is explained on p. 37 of our brief, on the merits, of 9 October, 1886.

Thomas Leitensdorfer proved that, from the date of his deed of 1867 to Baird, down to Baird's death in 1872, appellee was the owner, in possession, of this derivative claim. (Transc., 312.)

Eugene Leitensdorfer testified that his brother Thomas had been in continuous possession of the grant from 10 December, 1861; (*id.*, 420;) that Thomas built, in 1862, what is known as the Leitensdorfer ranch, and had always exercised full dominion over it; (*id.*, 423;) and that Baird never claimed an interest in the grant adverse to witness or to Thomas, nor did Baird's heirs or representatives save as to a Trinidad town lot. (*Id.*, 421.) The witness also testified that the claim of Cassandra E. Baird, wife of Baird, to $\frac{1}{16}$ of the grant, was not in conflict with the interest of witness. (*Id.*) The evidence of Eugene Leitensdorfer is corroborated by Mrs. Farnsworth. (Transc., 427.) Obadiah M. Smith, a witness for complainant before Stanton and Cook, when cross-examined by Bradford, Chilcott and McDonald, who, it seems, were of counsel for Craig, said that Baird and his family lived on complainant's derivative claim during part of 1869, "but did not occupy it as his property to my knowledge." (Transc., 318.) "Leitensdorfer," said Smith, "always claimed it as his property to me. Judge Baird claimed it, but he said that it was Leitensdorfer's property." (*Id.*) This explains Baird's claim of 17 July, 1869, to appellee's ranch, as filed with the surveyor general. (*Id.*, 101.)

Calvin Jones, sworn for Thomas Leitensdorfer, on the 15 November, 1878, said that witness came to Las Animas county in 1862; that Leitensdorfer was at work on his claim then, and "has been on it ever since to present time;" (Transc., 433;) that witness knew Baird well; that Baird never claimed the Leitensdorfer ranch as his own property, but "held it for Eugene Leitensdorfer as a matter of friendship." Witness had lived in the country since 1846. (*Id.*, 434.)

*Baird's power to Eugene Leitensdorfer was sufficiently proved before Stanton and Cook.* Appellee published a notice to the claimants of the Las Animas grant, that on the 15th of October, 1872, he would proceed to prove his claim before the register and receiver. (Transc., 284–5.) Accordingly, on that day, E. C. Holmes, J. W. Henry and G. A. Hinsdale appeared for him; and Bradford, Chilcott & McDonald, and H. C. Thatcher, apparently in Craig's interest, opposed appellee's claim. (*Id.*, 297.) From time to time evidence was offered and witnesses examined, by the respective counsel, and the case continued. On the 6 February, 1873, Craig was examined by Thatcher, and cross-examined by Holmes for Thomas Leitensdorfer. (*Id.*, 318.) The case was then continued to 18 February, 1873, when Hinsdale, for Leitensdorfer, filed paper 9, (*id.*, 297,) being the copy of the power from Baird to Eugene Leitensdorfer, (*id.*, 295,) and the case was closed. *No objection was made by Craig's counsel to this copy,* nor did complainant object to the copies offered by Craig, who opened his case on the 21 Feb-

ruary, 1873. No. 1, the first paper offered by Craig on that day, was a copy. (Transc., 195–6.) So was paper No. 2. (*Id.*, 198.)

*The bureau and department do not require original deeds, &c., to be filed.* Certified copies suffice. (*E. g.*, R. S., § 2321.) The chief ground of this ruie is, that "no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver." (Rule of Practice 50, 12 Copp's Land Owner, 155.) As originals, by this rule, could not be recovered from the local office, and might get lost or mislaid, and as copies of them, certified by the local officers, might be unavailing in court, it would be unreasonable to require originals to be filed with those officers. There is no rule, therefore, which makes such a requirement; and hence, when the claims of Leitensdorfer and Craig were tried before Stanton and Cook, no objection was made on either side to copies offered by the other side. If copies are objected to by the opposite party, which, it is believed, never occurs in practice, "the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the Commissioner." (Rule 41, XII Copp's L. O., 155; Spaulding on Pub. Lands, § 537, p. 298.) The present rules took effect 1 September, 1885. They are a reprint of those which took effect 1 February, 1881, (7 Copp's L. O., 170, rules 49, 41; Spaulding on Pub. L., § 537, p. 299, 298,) and spring from those approved by the secretary, on the 29 November, 1875, (2 Copp's L. O., 154–5,) which, as to the two rules quoted above, embody the practice of the bureau from the beginning.

In the trial of complainant's claim before Stanton and Cook, his counsel often objected to questions propounded on Craig's behalf; (*e g.*, Transc., 302, 317, 318, 319;) and of course, as this right of objection was reciprocal, Craig's counsel would have objected to the admission of this power of attorney had they wished. They seemed to have assumed that the register and receiver were favorable to Craig, and had final jurisdiction. But their waiver of objection bound Craig. (Broom's Max., 103.) "*Consensus tollit errorem* is a maxim of the common law and the dictate of common sense." (*Id.;* 7 Johnson, 611.) "Had the objection been taken before the trial—either at the examination of the witness or on a motion to suppress—to the proof of the copy without producing the original or showing its loss, the opposite party would undoubtedly have secured the production of the original, if in existence, or, if it be lost or destroyed, been prepared to account for its absence." (York Co. *v.* Central R. R., 3 Wall., 107, *114.*) The objection, now, is "to be considered as finally waived." (Blackburn *v.* Crawfords, *id.*, 175, *194–2.*)

Here, the original was filed with the recorder of Las Animas county, Colorado, so late as 1 June, 1872; (Transc., 296;) and, had the copy offered on the 18 February, 1873, been objected to,

doubtless the original would have been produced and Baird's signature proved. Why Stanton and Cook, in their elaborate opinions on the respective claims of Craig and Leitensdorfer, objected to copies offered by Leitensdorfer, (Transc., 326, 327,) and not to copies offered by Crag, (*id.*, 223,) we leave the court to consider.

## Reply to Appellant's Sixth Point.

Point sixth of Craig's brief, (p. 36,) is that Thomas Leitensdorfer fails "to point out any error in the decision of the Register and Receiver in rejecting his claim."

Whether that decision is right or wrong, it is appealable. Leitensdorfer appealed, (Transc., 331,) alleging the errors of Stanton and Cook. (*Id.*, 332–3.) He has a legal right to the trial of that appeal; but it cannot be tried till Craig's title be canceled. Hence this suit should be sustained, leaving the merits of the respective claims of Leitensdorfer and Craig to be decided by the commissioner and secretary successively, with the aid of such light as may be afforded them by the opinion and decree of this court. The errors of Stanton and Cook in their opinion rejecting Leitensdorfer's claim, and in their opinion sustaining Craig's claim, are obvious; but, as their consideration properly devolves on the commissioner and secretary, the specification of those errors in complainant's bill, was not essential.

The reasons of Stanton and Cook for rejecting complainant's claim, as enumerated on p. 37 of the brief for Craig, are these:

*First.* There was no legal delivery of the deed of donation from Vigil and Saint Vrain to Eugene Leitensdorfer. (This objection is answered in our preceding "REPLY TO APPELLANT'S SECOND POINT," and in our brief of 9 October, 1886, p. 39–40.)

*Second.* That deed reserves the donors' right to dispose of the grant lands to settlers, thereby postponing any right which Leitensdorfer might have to grants by the donors in behalf of others. (See the answer to this in our preceding "REPLY TO APPELLANT'S SECOND POINT," and "REPLY TO APPELLANT'S FIFTH POINT.")

*Third.* The claim under that deed being for an undivided sixth of the grant, could give no right to any one to appropriate any specific part of the grant in severalty. (But see our preceding "REPLY TO APPELLANT'S SECOND POINT.")

*Fourth.* No competent evidence was offered to establish the existence of that deed. (This objection is answered in our brief of 9 October, 1886, p. 39–40. The translated copy of the deed was offered by Thomas Leitensdorfer, as document No. 3, on the 23 October, 1872, Transc., 287, 297, in the trial before Stanton and Cook; and as Craig's counsel did not object to the copy, it is admissible. See conclusion of our "REPLY TO APPELLANT'S FIFTH POINT.")

*Fifth.* No competent evidence was offered showing Eugene Leitensdorfer's authority to convey to Thomas Leitensdorfer on the 10 December, 1861, and 22 May, 1872, as Baird's agent, after Eugene Leitensdorfer had, on the 24 February, 1860, conveyed his interest to Baird to evade creditors. (See answer to this in our preceding "REPLY TO APPELLANT'S FIFTH POINT.")

## REPLY TO APPELLANT'S SEVENTH POINT.

The brief for Craig, on p. 38, says that this suit cannot be maintained, because the evidence relied on before Stanton and Cook shows that no other decision than that rendered by them could have been made on the facts legally proved before them.

But this court is in possession of new facts showing that the decision of Stanton and Cook was obtained by bribery. Therefore, that decision should be annulled. Moreover, we have shown, in our preceding REPLY TO APPELLANT'S FIFTH POINT, that complainant's secondary evidence of his paper title was improperly disregarded by Stanton and Cook. Besides, the bill in this suit asks the cancellation of Craig's title because it was illegally issued in obedience to an illegal order of the president and prevents the trial, by the commissioner, of Leitensdorfer's appeal taken according to law and now pending in the land office here. If Leitensdorfer was entitled to that appeal and the trial of the appeal is illegally obstructed by Craig's title, this suit should be maintained, and that title should be canceled notwithstanding the decision of Stanton and Cook for Craig. That decision has no effect in law, for a lawful appeal from it is pending before the commissioner.

## REPLY TO APPELLANT'S EIGHTH POINT.

On p. 39 of Craig's brief it is said that this suit cannot be maintained, because the decision of Stanton and Cook is final in law and "cannot be attacked as between these parties on a charge of fraud, which, though imperfectly made in the bill, absolutely failed in the proof."

In our brief of 9 October, 1868, p. 62 *et seq.*, we have shown that the decision of Stanton and Cook for Craig was obtained by fraud. It was properly annulled, therefore, by the court below, even admitting that the act of 25 February, 1869, intended generally that such decisions should be final. But we have shown also, on p. 45 *et seq.* of our former brief, that there is no statute or authority attributing finality to such decisions. This court never attributes conclusiveness to the decisions of commissioners, in land cases, unless the terms of the act creating their powers unquestionably preclude all revisory jurisdiction. The act of 8 May, 1822, (3

stat., 709,) elaborately organized a board of 3 commissioners, to be appointed by the president with the consent of the senate, for the ascertainment of private land claims in Florida, (sec. 1,) empowering the board to appoint a secretary, (sec. 2,)—to compel the attendance of witnesses,—to administer oaths,—to demand access to public land records, (sec. 5,) and to command the services of the district attorney and marshal: (Supplemental act of 3 March, 1823, secs. 4 and 6, *id.*, 754.) The act of 1822 gave the board "power to inquire into the justice and validity of the claims filed with them," declaring that the board, "if *satisfied* that said claims be correct and valid, shall give confirmation to them, *Provided*, that such confirmation shall only operate as a release of any interest which the United States may have." (Sec. 5.) Yet chief justice Marshall, in deciding U. S. *v.* Percheman, (7 Peters, 51,) said, "it can admit of no doubt that the decision of the commissioners was conclusive in no case until confirmed by an act of congress." (*Id.*, 94.)

Craig's brief, p. 41, alleges that this land "is not, and never was, any portion of the public land of the United States;" that "Congress did not grant any land," and that this land, therefore, does not belong to the class of "private land claims."

But Craig admits in his answer, (Transc., 60,) that the acts of 1860 and 1869 treat the derivative claimants "more as anomalous homesteaders than as *con*firmees." The Mexican grant was void for want of jurisdiction in the governor to make a grant of 922 leagues, and stands now expressly barred by the act of 25 February, 1869, s. 5,—the act under color of which Craig proved his claim and got his approved plat; so that, if there be no grant of any kind by congress, Craig's title is null, and should be canceled, and the commissioner should be left free to award quarter section homesteads or preëmptions to all the derivative claimants entitled, in his opinion, to them, under s. 1 of the act of 25 February, 1869. The vital question is,—does R. S., § 453, apply to these derivative claims? That section declares that "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government." Whether the claims of Leitensdorfer and Craig belong to the class of public lands or to the class of private claims, is not material. They must belong to one or the other, and in either case they are within R. S., § 453. If so, the commissioner and secretary had power to review the action of Stanton and Cook in deciding the claims of Leitensdorfer and Craig. (See also, R. S., § 441, 2478, and our brief of 9 October, 1886, p. 45 *et seq.*)

On the 8th of February, 1879, (Transc., 115,) complainant introduced in evidence, among other testimony, the document Y, being a transcript of Craig's title as certified by the acting commissioner of the general land office. (*Id.*, 194.) Part of that title is a patent for Craig's claim, dated 8 January, 1878, pending this suit, and delivered to him by the bureau in Washington on the 11 January, 1878. (*Id.*, 228.) This patent plausibly recites that it issued under R. S., § 2447, (*Id.*, 234,) which provides for patenting certain confirmed "claims;" so that Craig's acceptance of the patent is a practical assertion that his claim is a *confirmed claim*, and a practical admission, therefore, that it is within R. S., § 453. It is within that section for the additional reason that the government has issued to him an approved plat for his claim under color of an act which makes the plat equivalent to a patent, and has also issued to him an actual patent; whilst R. S., § 453, clearly gives the commissioner control of "the issuing of patents for all grants of land under the authority of the Government." Craig, on p. 51 of his brief, after quoting s. 4 of the act of 25 February, 1869, admits that "There can be no doubt that the approved plat referred to in the above quotation from the act of Congress *was intended as a substitute for a patent;*" and Judge Dillon, in overruling Craig's demurrer to the supplemental bill, said that his approved plats are "equivalent in legal effect to an ordinary patent as evidence of title." (5 Dillon C. C. Rep., 419.)

It is said on p. 42 of Craig's brief, that *the settlers already had title from Mexico, confirmed by the United States.* This is an error. The sole confirmees were Vigil and Saint Vrain, and it turned out that they had no interest and were therefore mere nominal confirmees. The settlers were not the grantees and hence are not confirmees. They can have no title at all but legally approved plats. Craig's plat and patent, whether legally issued or not, amount to an admission that he claims under the United States. The Mexican title of Vigil and Saint Vrain was void. It is assuredly so now. (Act 25 Feb., 1869, s. 5.)

Craig argues, on p. 43 of his brief, that if the decision of Stanton and Cook for Craig be set aside upon the appeal to the commissioner, "then we are to commence *de novo* before another register and receiver," &c. Such is not the law. The claims of appellant and appellee are pending for review before the commissioner, who, under the secretary's supervision, will, if this court affirms the decree below, proceed to render the decisions which Stanton and Cook should have rendered. An appeal to the commissioner, though convenient and usual, was not essential. Where, as here, "fraud or gross irregularity is suggested on the face of the papers," or "the decision is contrary to existing laws or regulations," (Rule of Practice 48, Spaulding on Pub. Lands, § 537,

p. 299, where the rule is No. 47,) the commissioner will review the case *ex officio*. (Rule 49.) It is possible, though not usual, to remand a case for trial *de novo* before the registers and receivers. Their function is to report facts and their opinions; the commissioner and secretary decide the case finally, and the secretary, on appeal, tries the case *de novo*. (Opinion of solicitor general Samuel F. Phillips, 14 Opinions, 604.) The secretary's power of review is very broad, (R. S., § 441, 453, 2478,) and no rule can take it away. (Rule of Practice 114, Spaulding, Pub. Lands, § 537, p. 306.) If the commissioner, on the merits, decides against Craig, an appeal will lie to the secretary who will try the case *de novo* like an appeal in equity. (Rule of Practice 81; and see the Opinion, Revised Statutes and Rule, last above cited.)

*To show that Stanton and Cook were a special tribunal, exercising final judicial functions*, Craig's brief, on p. 43, cites U. S. *v.* Ferreira, 13 How., 40. That case arose under the Florida treaty of 22 February, 1819, art. 9, last clause, (8 Stat., 252, *260*,) the act of 3 March, 1823, III Stat., 768, and the private acts of 26 June, 1834, VI Stat., 569, and 3 March, 1849, IX Stat., 788, and differs from this case. The Florida treaty left the U. S. no discretion in satisfying claims like Ferreira's, whereas, respecting the grant to Vigil and Saint Vrain, Craig admits "that the obligation of the United States to protect this and similar grants devolved solely on the political department of the Government to be discharged as Congress should provide." (Answer, Transc., 59.) The Florida treaty required claims like Ferreira's to be established "by process of law;" whereas the statute in this case omits to prescribe by what process the derivatives shall establish their claims. The act of 3 March, 1823, S. 1., required a U. S. *judge*, in claims like Ferreira's, to *adjust* the claims, in the first instance, agreeably to the treaty provisions; whereas, in this case, the act of 25 February, 1869, leaves the primary settlement of derivative claims to men having no facilities for attaining a correct opinion, and prescribes no principles of adjustment. In Ferreira's case, the U. S. were represented by a district attorney, whose duty it was, "if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge;" (U. S. *v.* Ferreira, 13 How., *49*;) whereas, in this case, the letter of the act of 1869 contemplated no counsel for the U. S., and provided no means for obtaining evidence against claims and no remedy against improper evidence produced by claimants. The omissions in the act of 1869, thus recapitulated, are intelligible if the act intended that these derivative claims should be adjusted, like homesteads and preëmptions, under the broad and wholesome supervision of the commissioner and secretary.

But Ferreira's case, though different from Craig's in the above respects, is like it in others. The court, in Ferreira's case, (13 How., p. 47,) referring to the award of the judge and to the secretary's decision, declared "that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one." The supplemental act of 26 June, 1834, S. 1., in Ferreira's case, treated the finding of the judge as an "award," subject to the review of the secretary of the treasury; thus showing that if the finding of Stanton and Cook for Craig, in the present case, be an *award of a board of commissioners*, these terms do not necessarily exclude a revisory power on the part of the commissioner and secretary.

Ferreira's case shows that the *award of a commissioner to adjust claims* may be reviewed, first, by the secretary of the treasury, and secondly and necessarily by congress in granting or withholding an appropriation; (see private act of 3 March, 1849;) and here, the act of 1869 would also have doubtless provided for a review of the findings of the register and receiver, had not the general system of land law already done so. The act of 3 March, 1849, in Ferreira's case, guarded against the possibility of fraud and error on the part of the judge, by directing that his adjudication should be made under the act of 26 June, 1834, which subjected the decision to a review by the secretary of the treasury. But here, there is no safeguard at all against fraud or error on the part of Stanton and Cook, if their power be supreme. This court, in Ferreira's case, held that the power of the judge and secretary was not strictly judicial, and that therefore this court had no jurisdiction of an appeal to the court, by the United States, from an award in favor of Ferreira made by the judge of the U. S district court for the northern district of Florida. This decision, which is manifestly right, only shows that no appeal to the courts lies from the decision of Stanton and Cook against Leitensdorfer. Nor is any such an appeal necessary; for, as the special legislation, in Ferreira's case, had amply provided for an executive review of his award, so the general legislation, in the present case, has amply provided for an executive review of the decision of Stanton and Cook in favor of Craig.

That decision was an exercise of judgment and discretion, but not of judicial power: "it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact;" (Murray's lessee *v.* Hoboken land and Impt. co., 18 Howard, 272, 280;) for, "by the constitution judicial power can be conferred by Congress only on the courts." (*Ex Parte* Randolph, 2 Brock. Reports of C. C. decisions of Marshall, p. 447, arising under act 15 May, 1820, s. 2, III stat., 592:) But the fact that the decision of Stanton and Cook for Craig was an exercise of judgment and discretion, does not justify the inference that

those officers were arbitrators, or that the decision was an award, or conclusive. A joint resolution of 1 June, 1860, (12 stat., 873,) in the claim of George Fisher, required the secretary of war to *consider* evidence and *settle* his account, and to make such allowance "as in his opinion justice to the claimant shall require." But in Gordon *v.* U. S., (7 Wall., 188, *194*,) this court held that the finding of the secretary under the resolution was not an award; that he was not an arbitrator, and had no judicial power; and that it was competent for congress, by its joint resolution of 2 March, 1861, (12 stat., 895,) to annul the joint resolution of 1 June, 1860, and all proceedings under it, although the secretary, on 23 November, 1860, had allowed the account.

The brief for Craig, on p. 44, cites *ex parte* Atocha, (17 Wall., 439,) to show the finality of the decision of Stanton and Cook for Craig. The Atocha case arose, indirectly, under the treaty between the U. S. and Mexico of 2 February, 1848, Art. XV, which provided for a board of commissioners of claims, saying their "awards shall be final and conclusive." (9 stat., 933.) The act of 3 March, 1849, (*id.*, 393,) organized the board, which consisted of three commissioners, and Atocha presented his claim to it, with what precise result does not appear. After that, the claim was referred, by special private act of 14 February, 1865, (13 stat., 595,) amended by special private act of 5 April, 1870, (16 stat., 633,) to the court of claims, with directions to *examine into the claim*, and to *adjudicate* it, and to *fix* the amount of the claim if in their opinion it was a just one against Mexico and within the treaty. The amending act authorized the use of certain evidence by the court; but as neither act provided for an appeal to the supreme court, it was held that no appeal lay. (17 Wall., 445.)

But *ex parte* Atocha is not in point. The rules of decision were prescribed in such cases. (Treaty of 2 Feb., 1848, Art. XV, 9 stat., 934; act 3 March, 1849, S. 1, *id.*, 393; act 14 Feb., 1865, 13 stat., 595.) The evidence to be used in Atocha's case, before the court, was defined. (Act 5 Ap., 1870, 16 stat., 633.) Ample facilities were provided for getting evidence in such claims, (Art. XV of the treaty; act 3 March, 1849, S. 3,) and for securing a full and fair trial. (Act 3 March, 1849, secs. 2, 4, 8.) The final judgment in Atocha's case was by the court of claims; the U. S. were represented at the bar, (act 5 April, 1870,) and the usual machinery of courts was of course employed to secure an intelligent and just decision. Atocha's claim was subjected to two examinations before it was paid, namely, the trial before the Mexican claims' commission and the trial before the court of claims. The case shows that when the U. S. refers claims for conclusive adjudication, not to a court, but to commissioners, the board con-

sists of an odd number, the principles of decision are prescribed, elaborate provisions are made by law for securing a full and fair trial, and the statute declares that the award shall be final.

*Ex parte* Zellner, (9 Wall., 244,) is nearer this case. There the question was whether the act of 24 February, 1855, (10 stat., 612,) organizing the court of claims, as amended by act of 3 March, 1863, s. 5, (12 stat., 765,) which allows appeals to this court "from any final judgment or decree which may *hereafter* be rendered in *any* case," would sanction an appeal in cases under the Abandoned Property act of 12 March, 1863, (12 stat., 820,) which allowed the owners to recover the proceeds of such property, by proceedings before the court of claims, "on proof *to the satisfaction of said court*," (sec. 3,) but did not provide for any appeal. The government, before this court, "contended that no appeal being specially given by the Abandoned Property Act, and the whole matter in proceedings under that act being referred to the satisfaction of the Court of Claims, the case was not embraced by the general right of appeal given by the previous act of March 3d, 1863, reorganizing the Court of Claims." (9 Wall., 246.) But this court held that Zellner had a right, under the act of 3 March, 1863, S. 5, to appeal from the adverse decree of the court of claims, saying, "The subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization. If new or additional subjects of jurisdiction were conferred the effect would be, simply, to increase the labors of the court, the cases to be heard and determined under the existing organization." (9 Wall., 246–7.)

So, the act of 3 March, 1851, to ascertain and settle private land claims in California, through a board of 3 commissioners, provided, by s. 9, for a review of their decisions by the U. S. district courts, and, by s. 10, for an appeal thence to this court. (9 stat., 631.) The supplemental act of 1 July, 1864, s. 4, (13 stat., 332,) allowed the district courts, in such cases, if affecting title to land in an incorporated town, to *transfer* the cases to the circuit court for determination; but the act did not provide for appeals, in the latter cases, from the circuit court to this court. Yet, in U. S. *v.* Circuit Judges, (3 Wall., 673,) the majority of the court held that such appeals lie; and this decision was relied on, by the full bench, in *Ex parte* Zellner, 9 Wall., 244, *247*, reviewed above.

On p. 45 of Craig's brief, he cites Johnson *v.* Towsley, 13 Wall., 72. In that case, and in Samson *v.* Smiley, *id.*, 91, both of which came here from the supreme court of Nebraska, the great question was as to the effect of s. 10 of the act of 12 June, 1858, (11 stat., 319, *326*,) which declared that appeals in contests between preëmptors should thereafter be decided by the commissioner, "*whose decision shall be final*, unless appeal there-

from be taken to the Secretary of the Interior." This court, in Johnson *v.* Towsley, quoted "the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and also quoted the above provision from s. 10 of the act of 12 June, 1858; and yet the court held that errors of law by the land officers, might, nevertheless, be corrected in equity. (13 Wall., 83, 82, 86.) The bill of Towsley, (*id.*, 76,) and apparently the bill of Smiley, (*id.*, 92,) was filed to remove from their respective titles the clouds caused by the patents of Johnson and Samson respectively; and this court granted the relief in both cases, thus overruling the decisions of the secretary under which those patents had issued. Towsley sued on his patent, but Samson's title was merely equitable. Towsley's case is reviewed and sustained in Rector *v.* Gibbon, 111 U. S., 276, *290*.. It is likely, in view of s. 10 of the act of 12 June, 1858, that the act of 25 February, 1869, in Craig's case, would have declared that the decisions of the register and receiver, on the derivative claims, should be final, had congress intended them to be final; but even then, it is clear from Johnson *v.* Towsley and Samson *v.* Smiley, that such finality would not have precluded equity from granting the relief sought in Leitensdorfer's supplemental bill. It may also be inferred, from those cases that, as the general system of equity gave relief in them against decisions expressly declared by statute to be final, so, in the present controversy, the general system of land law gives relief by appeal to the commissioner and secretary, successively, from the decisions of the register and receiver, especially since the statute of 1869 does not expressly declare them to be final. For this court, in Johnson *v.* Towsley referring to s. 10 of the act of 12 June, 1858, said:

"But the section under consideration is only one of several enactments concerning the relative duties, power, and authority of the executive departments over the subject of the disposition of the public lands, and a brief reference to some of them will, we think, show what was intended by this amendment." (13 Wall., 82.) The court then cites the act of 4 July, 1836, s. 1, 5 stat., 107, (printed in appendix to this brief, No. 1,) and the case of Barnard *v.* Ashley, 18 Howard, 43. So, in Craig's case, a brief reference to the act of 4 July, 1836, s. 1, as construed in Barnard *v.* Ashley, and to other acts in *pari materia*, will, we think, show what was intended by the act of 25 February, 1869.

To prop up the conclusiveness of the decision of Stanton and Cook for Craig, he relies, upon p. 45 of his brief, on Butterworth *v.* Hoe, 112 U. S., 50. That was a case of patent for an invention. In such patents the application is first decided by the "primary examiner." (R. S., § 4904, 4909.) If he rejects it twice an appeal

lies "to the board of examiners-in-chief." (*Id.*) From their decision an appeal lies to the commissioner of patents; (*Id.*, § 410;) and from his decision an appeal lies to the supreme court of the district of Columbia in banc, (*id.*, § 4911,) whose decision "shall govern the further proceedings in the case." (*Id.*, § 4914.) And in all cases where a patent is due *the commissioner issues it.* (*Id.*, § 4915, 4893.) In Butterworth *v.* Hoe, the court held that these specific provisions preclude the secretary of the interior from entertaining appeals from the commissioner of patents in virtue of the secretary's *general* powers of supervision as conferred by R. S., § 441, 481, 483, 487 and 4883. That sturdy old Welsh royalist, David Jenkins, had decided the case, in his prison, 250 years ago, in four words:—*generalia specialibus non derogant.* (Jenk. Cent., 120.)—The general provisions vesting the secretary with supervisory power, could not derogate from the special provisions vesting the supreme court of the district of Columbia with the appellate power. But those special provisions derogate from the general provisions, for *generalibus specialia derogant.* (Halkerston's Max., 51.) And so, here, the general provision in the act of 25 February, 1869, vesting the register and receiver with power to hear these derivative claims, could not derogate from the special provisions in the act of 4 July, 1836, s. 1, and in R. S., § 453, vesting the commissioner with his supervisory and controlling power. "General words subsequent shall be restrained by precedent particular words." (14 Vin. Abr., 61; Branch's Pr.)

Craig concludes the 8th point of his brief, on p. 46, with the proposition that, if the act of 4 July, 1836, s. 1, (5 stat., 107,) gave Leitensdorfer an appeal to the commissioner, "then the whole matter by the statute was under the supervision of the President of the United States;" and the brief suggests that, if the president's supervisory power was taken away by the revised statutes, still Craig's accrued right to invoke the president's supervision was saved by R. S., § 5597. To support this alleged power of the president, Craig quotes Johnson *v.* Towsley, 13 Wall., 72, where the court, quoting from the act of 4 July, 1836, s. 1, said:—"it is obvious that the direct control of the President was contemplated whenever it might be invoked." (13 Wall., 82.) The act of 1836 had declared that the executive duties contemplated by it "shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States;" and the court, in Johnson *v.* Towsley, perhaps meant that the president's direction must be invoked *by the commissioner* when, in cases of doubt, he might feel the necessity of such direction; for the commissioner had no right to invoke the opinion of the attorney general, that right being limited to the president and the heads of departments; (act 24 Sep., 1789, s. 35, 1 stat., 73, *93;* R. S., § 354, 356;) and the term *direction*, in

the act of 1836, could not, without the aid of long executive usage, be wrested to mean the hearing and determining of contests by the president.

But the words of the court, on this point, in Johnson *v.* Towsley, are a mere *dictum*. The direct control of the president had not been invoked there. The question was, not the power of the president to review the secretary's final decision, but the power of a court of equity to do so. Besides, since the decision in Johnson *v.* Towsley, the provision in the act of 1836, cited by the court, has been much more elaborately considered, and the doctrine of this court now is, that the act intended the direction by the president to be exercised through the head of the department and not by personal interference. (Snyder *v.* Sickles, 98 U. S., 203, 210–211.) Before approving the act of 4 July, 1836, president Jackson referred this question to the attorney general, who, on that day, rendered the opinion that the bill, if approved by the president, would still leave the general land office, as before, *subject to the general superintendence of the president through the head of the department*. (3 Opinions, 137.) The president then approved the bill, and, on the same day, issued his written directions to the secretary of the treasury, then the head of the land department, enforcing the opinion of the attorney general. (Pub. Lands. Laws, Opinions and Instructions, Part II, p. 104.) See also the opinions of presidents Pierce and Buchanan, 1 Land Laws, Regulations and Decisions, Lester, 508, 680, and opinion of justice Field in Patterson *v.* Tatum, 3 Sawyer, C. C., 164, cited Spaulding on Pub. L., § 14.

Under the old preëmption act of 29 May, 1830, s. 3, (4 stat., 420,) there was no appeal to the commissioner from the decisions of the register and receiver. (3 Opinions, 93, 104, 126.) But the act of 4 July, 1836, s. 1, gave the commissioner supervision of such cases, under the direction of the president. (Barnard *v.* Ashley, 18 How., 43, *45*.) After that, the general preëmption act of 4 September, 1841, § 11, (5 stat., 453,) took away the commissioner's supervisory power and vested it temporarily in the secretary of the treasury, "and *so far as the act of 1836 associated the president with the commissioner, superseded his supervisory functions also.*" (Johnson *v.* Towsley, 13 Wall., 83.) If this be so, it follows, even from the case of Johnson *v.* Towsley, that the act of 3 March, 1849, s. 3, (9 stat., 395, and printed in appendix to this brief, No. 2,) which, without referring to the president, gave the secretary of the interior, whose department it created, the permanent supervision of the commissioner, in all cases, took away all possible supervisory power of the president in such cases. But the act of 3 March, 1849, is now superseded by R. S., § 441, 453, 2478, which still substitute the direction of the secretary for that of the president, and have thus repealed, also, the act of 4 July, 1836, s. 1.

(See R. S., § 5596.) The adoption of the revised statutes on the 22 June, 1874, antedates Craig's appeal to the secretary which was taken on or after the 1 October, 1874; (Transc.. 397–8;) so that any directing power that the president could ever possibly have had in Craig's case, under the act of 1836, ceased before he appealed to the president. That act having been repealed on the 22 June, 1874, the *dictum* in Johnson *v.* Towsley, which was decided before the repeal, has ceased to be important. As to Craig's suggestion, on p. 46 of his brief, that his accrued right to invoke the president's direction was saved by R. S., § 5597, it is enough to say that no such right ever existed, and that his application to the president was not yet pending when the act of 1836 was repealed on the 22 June, 1874.

Indeed, if Johnson *v.* Towsley be right, the president's power to direct the commissioner generally, admitting it to have once existed, must have been transferred to the secretary by act of 3 March, 1849, s. 3. The mere fact that no president ever before assumed appellate jurisdiction in any land case, is powerful evidence that no such jurisdiction existed or exists, but that, in the language of rule 113 of the code of practice prescribed by the secretary in land cases, "The decision of the secretary, so far as respects the action of the Executive, is final." (7 Copp's Land Owner, 174; Spaulding on Pub. Lands, § 537, p. 306.) That code proceeds on the hypothesis that appeals lie from the register and receiver to the commissioner and from him to the secretary, in every case, with trifling exceptions not applicable here.—"Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)" See rule 43, XII Copp's Land Owner, 155; Spauld. on Pub. Lands, p. 298. And "An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions, and orders for hearing or other matter resting in the discretion of the Commissioner," &c.; (Rule 81, XII Copp's L. O., 156; Spaulding, p. 303;) for even under the act of 3 March, 1849, s. 3, "The jurisdiction to revise on appeal was necessarily co-extensive with the powers to adjudge by the Commissioner." (Magwire *v.* Tyler, 1 Black, 195, *202*.)

On p. 47 of Craig's brief, he defends Stanton and Cook against complainant's charge of fraud. For a review of the evidence on which this charge is founded, and for the argument sustaining the charge, the court is referred to our brief of 9 Oct., 1886, for complainant, p. 62 and *seq*.

## Reply to Appellant's Ninth Point.

Craig says on p. 50 of his brief, as his ninth point, that, as this suit is brought to cancel a U. S. land title, it should have been brought in the name of the United States. But that is only necessary where, as in Mullan *v.* U. S., (118 U. S., 271, *276*,) "if the title is vacated the lands will be restored to the public domain." Leitensdorfer's right to sue in his own name is sustained on p. 25 and *seq.* of our brief of 9 Oct., 1886. But it is too late to raise an objection, in this court, to Leitensdorfer's capacity, after tacitly waiving the objection in the lower court. Non-joinder "must be taken advantage of before the final hearing." (Bouv. Dict., "Non-Joinder.)" Johnson *v.* Towsley, (13 Wall., 72,) was a bill for the surrender of Johnson's junior U. S. patent on the ground that it had issued illegally for the ½ quarter section covered by Towsley's senior settlement and U. S. patent and was a cloud on the senior title; (*id.*, p. 76;) and this court granted the relief, as it did also in Samson *v.* Smiley, (*id.*, p. 91,) which differed in no respect from Johnson *v.* Towsley, save "that when the register and receiver decided in favor of Smiley against Samson, in the contest for the right of preëmption to the land, they did not give him a patent certificate as they did to Towsley." (*Id*, p. 92.) Yet in neither of these cases was the objection dreamed of that the U. S. must sue to get rid of its own patent. Neither bill was technically a bill to cancel; but Towsley's bill, as sustained by this court, was equivalent to that, for, it set up a legal patent of Towsley to a ½ quarter section against the junior illegal settlement and patent of Johnson for the same tract, so that it was impossible to sustain the bill save on the ground that the junior conflicting settlement and patent were void. The legality of the senior settlement and patent necessarily involved the nullity of the junior conflicting settlement and patent; for the U. S., after lawfully conveying the land by patent to Towsley, had no residuum of title left to convey to Johnson.

So in Van Wyck *v.* Knevals, (106 U. S., 360,) where the land department issued a patent to Van Wyck extrinsically invalid, and then refused one on the conflicting grant under which Knevals claimed, the latter filed his bill against Van Wyck in the U. S. circuit court for the Nebraska district, alleging that Van Wyck's patent was a cloud on complainant's title. There was a decree for complainant, ordering a conveyance to him of the legal title. Van Wyck appealed. This court, through justice Field, affirmed the decree, saying—"The existence of the patent, therefore, embarrasses the assertion of the complainant's rights; that is, it prevents him from obtaining a strictly legal title which would enable him to recover possession of the premises by an action at law. *The existence of the patent also creates a cloud upon the title of*

*the land. Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it require extrinsic evidence to show its invalidity. Pixley v. Huggins*, 15 Cal. 128." (106 U. S., 370.) In Van Wyck *v.* Knevals as in Johnson *v.* Towsley, it is plain that this court, at the suit of a citizen, without questioning his capacity, held the U. S. patent of the defendant below to be void; for the court says "that when the defendant made his entry of the lands in controversy, and obtained a patent therefor, the title had passed from the United States, *and consequently no right could be conferred upon him;*" and for the same reason the court adds, with the acumen which marks all of justice Field's decisions, that, instead of a conveyance of the premises to the complainant, Knevals, the relief "should properly be limited to a decree declaring the equity of the complainant, the invalidity of the title of the defendant, and enjoining him from the assertion of any claim to the property under the patent." (*Id.*)

## Reply to Appellant's Tenth Point.

The 10th point in appellant's brief, p. 58, is that the decree below is erroneous because it cancels the evidence of his title to all the land awarded him by Stanton and Cook, though not more than 8,000 acres could possible enure to complainant.

Complainant filed his derivative claim before Stanton and Cook for certain divisions and subdivisions amounting to 25 sections or 16,000 acres. (Transc., 284.) We have shown, on p. 39 of our brief of 9 Oct., 1886, that "the matter in dispute," in this suit, is Craig's title, not complainant's, and that, were it otherwise, complainant retained, when this suit was filed, enough land to give jurisdiction to the court below. Such being the case, it is not material to inquire what conveyances complainant may have made after filing his claim before Stanton and Cook; for the proceedings before the executive and judicial departments must continue in Thomas Leitensdorfer's name, for the benefit of whom it may concern. See the order of this court of 7 January, 1884, denying the motion of Mrs. Leann S. King, as the purchaser of Thomas Leitensdorfer's claim, to intervene in this case or to be substituted for him; and the secretary's decision of 15 September, 1884, denying her motion to intervene, or be substituted, in the general land office. (3 Decisions of Int. Dept. relating to Pub. Lands, 110; and see 2 *id.*, 378.) Any decree of this court or decision of the executive, in Thomas Leitensdorfer's favor, will at once enure to all those holding title under him. See p. 35 of our brief of 9 October, 1886.

Leitensdorfer's supplemental bill attacked the whole title of Craig, as a unit, on the ground that Craig obtained the decision

of Stanton and Cook by corruption; and on the independent ground that the decision was appealable, that complainant had appealed from it, and that Craig's evidence of title had issued illegally, pending that appeal. If either of these grounds be tenable, Craig's title is illegal for every acre embraced in it. His title is indivisible. It is all good or all bad. These reasons are also a

REPLY TO APPELLANT'S ELEVENTH POINT

which avers that the decree below is erroneous because it cancels the title to the whole amount awarded Craig by Stanton and Cook, though the record shows that Craig holds title to a large part of it under unquestioned deeds from complainant's immediate grantors made before any conveyances to complainant. (See brief for Craig, p. 59.)

REPLY TO APPELLANT'S TWELFTH POINT.

Point twelve in the brief for appellant, p. 60, holds the decree below to be erroneous because it cancels Craig's evidence of title to all the land awarded him by Stanton and Cook, without inquiring the quantity which it would be possible for complainant to maintain title to, the record showing numerous conveyances from him and his grantors absorbing nearly, if not quite, $\frac{1}{6}$ of the land confirmed.

Thomas Leitensdorfer, being, in the words of the act of 25 February, 1869, s. 1, in the category of "actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives," could maintain this suit to cancel Craig's title, as an illegal cloud on his own, if the sole property of complainant was his actual settlement; for the act of 1869, like all homestead acts, looks only to the *bona fides* of the settler, and to the fact and right of settlement, without regard to the extent or value of the land settled upon; and we have shown, on p. 39 of our brief of 9 October, 1886, that "the matter in dispute" now is simply Craig's title. But, if complainant's claim be the matter in dispute, we have shown, on the same page, that the interest in the claim, remaining to complainant when he filed this suit, was much more than $500. The value of his improvements, exclusive of his land, is $1,000. (Transc., 433.)

Craig's brief, p. 60, deducts from complainant's claim "three miles of the *Huerfano* Valley, say, 2000 acres." But Craig shows under his XI. point, that these alleged 2000 acres are in Craig's claim. They are therefore no part of Thomas Leitensdorfer's

claim, and never were. The quantity is not 2000 acres, for, by Craig's deed to Lewelling, (Transc., 442,) one mile of a larger valley, that of the Las Animas, is but 230 acres. So that 3 miles of the Huerfano valley would probably not exceed 690 acres. But, whatever it may be, it must be debited against Eugene Leitensdorfer's original $\frac{1}{6}$ interest in the grant, and not against his brother's located 16,000 acre settlement claim in the remote *Las Animas* valley. There are other errors in Craig's computation, on p. 60 and 61 of his brief, respecting the interest subsisting in complainant when he filed his bill; but they have already been anticipated and refuted under point IV on p. 32 of our brief of 9 October, 1886. See, too, our reply above to Craig's X. point.

## Reply to Appellant's Thirteenth Point.

Point XIII of the brief for Craig, p. 61, is this:—

"The decree is erroneous because it cancels the patent of the United States granted and issued to Craig after issue joined in this cause, and which is not mentioned in any pleading *or in the Master's report in the case*, but is only found as one of the exhibits of said Master's report."

On the 30 January, 1879, the court below referred this cause to Edward F. Bishop, one of the masters in chancery, of the court, to take proof in the cause. (Transc., 114.) On the 3 February, 1879, complainant's counsel caused formal notice to be served personally at Denver, Colorado, on G. G. Symes, attorney of record for Craig, (Transc., 24, 25,) that, on the 8 February, 1879, they would take testimony and file copies, &c., on behalf of complainant, at Denver, before the master. (*Id.*, 117.) Accordingly, at the time and place mentioned in the notice, the master, according to his report, as filed on the 26 February, 1879, (*id.*, 114,) "was attended by J. Q. A. King, Esq., solicitor of the said complainant, who introduced certain instruments of writing in evidence, said instruments of writing being marked by me A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A', and B', and accompanying and made a part of this my report." (*Id.*, 115.) The document Y, thus referred to by the master, was a transcript of Craig's title, as certified by the acting commissioner of the general land office. (*Id.*, 194.) Part of that title, and of instrument Y, is the patent for Craig's claim, (Transc., 228,) dated the 8 January, 1878, (after the demurrers of the surveyor general and Craig to the supplemental bill, *id.*, 52–3,) and delivered personally to Craig, in Washington, by the general land office, on the 11 January, 1878. (*Id.*, 228.)

The patent, thus filed in court on the 26 February, 1879, was properly before the court when annulled by the final decree of

2 July, 1880. The court doubtless considered that, as the patent was obtained by Craig *pendente lite*, its cancellation was "agreeable to equity and good conscience," and was therefore within Leitensdorfer's prayer for general relief. (Transc., 50.) The president's order of 2 March, 1877, is the preamble to the patent, (Transc., 229,) and the instrument recites the decision of the register and receiver for Craig, (*id.*, 230–231 *et seq.*,) and incorporates the approved plat. (*Id.*, 234.) If that order, decision and plat were illegal, as charged in complainant's supplemental bill, the patent, which is wholly founded on them, is illegal in consequence. It is impossible to sustain the charges of complainant against those foundations of the patent, without annulling the patent. *Debile fundamentum fallit opus.* The patent simply enforced the decision of Stanton and Cook, the fiat of the president, and the approved plat, and added nothing to the strength of Craig's title. It issued in alleged "conformity with section two thousand four hundred and forty-seven of the Revised Statutes of the United States," (Transc., 234,) which provides that where a land claim had been confirmed by law, and the confirmatory statute had made no provision for the issue of a patent, one may issue "upon the presentation to the Commissioner of the General Land-Office of plats of survey thereof, duly approved by the surveyor-general of any State or Territory, if the same be found correct by the Commissioner." But the section declares that "such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land." (R. S., § 2447.)

Craig having obtained personal delivery of this patent to himself on the 11 January, 1878, should have set it up in his answer, which was filed on the 7 October, 1878. (Transc., 58.) As he did not do this, complainant's counsel rightly offered it in evidence before the master on the 8 February, 1879, that it might be decreed void by the court and that thereby a second suit might be obviated. As a *relinquishment* patent it was extrinsically void, because, among other reasons, Craig had already accepted an approved plat which, if legal, had conveyed the fee to Craig and left the government nothing to relinquish. But the patent was a cloud on complainant's claim and a trap to catch innocent purchasers from Craig, and was properly canceled. "Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title, if it require extrinsic evidence to show its invalidity. *Pixley* v. *Huggins*, 15 Cal., 128." (Van Wyck *v.* Knevals, 106 U. S., 360, *370*, by Field, J.)

## Reply to Appellant's Fourteenth Point.

Craig ends his brief, on p. 62, with his point XIV., which holds that the decree below is erroneous because not limited to the cancellation of the evidence of his title to so much land as was vested in Craig when the decree was passed.

This point is answered on p. 71 *et seq.* of our brief of 9 October, 1886.

Complainant published the usual *lis pendens*, as will be shown, if necessary, in future proceedings; but the Colorado Code of Civil Procedure, C. 3, s. 38, p. 13, does not govern an equity case in a U. S. court. (U. S. R. S., § 913, 914; and see Coffey *v.* U. S., 117 U. S., 233.)

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On the 12 October, 1886, the death of complainant being suggested, an order was entered by this court admitting Edward J. Hubbard, his administrator, as a party defendant in this appeal. On the next day, we filed his letters and his power authorizing us to represent him, and entered our appearance accordingly. On the 12 October, 1886, the death of appellant, Craig, was also suggested to the court, and afterwards an appearance was entered for his executor, Francis Downs.

We ask that the court may affirm the decree below, with the modification suggested on p. 74 of our brief of 9 October, 1886.

ROBT. H. BRADFORD,
CHARLES W. HORNOR;
For Thomas J. Allen,
And for Edward J. Hubbard
*Admr. of Thomas Leitensdorfer.*

Washington, D. C., 1 *February*, 1887.

# APPENDIX.

## No. 1.

[Act of 4 July, 1836, V. stat., 107.]

CHAP. CCCLII.—*An Act to reorganize the General Land Office.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.

* * * * * *

SEC. 11. *And be it further enacted*, That such provisions of the act of the twenty-fifth of April, in the year one thousand eight hundred and twelve, entitled "An act for the establishment of a General Land Office in the Department of the Treasury," and of all acts amendatory thereof, as are inconsistent with the provisions of this act, be, and the same are hereby, repealed.

2 Stat., 716.

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APPROVED, July 4, 1836.

## No. 2.

[Act of 3 March, 1849, IX. stat , 395.]

CHAP. CVIII.—*An Act to establish the Home Department, and to provide for the Treasury Department an Assistant Secretary of the Treasury, and a Commissioner of the Customs.*

* * * * * *

SEC. 3. *And be it further enacted*, That the Secretary of the Interior shall perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury; and the said Secretary of the Interior shall sign all requisitions for the advance or payment of money out of the treasury, on estimates or accounts, approved or certi-

fied by the Commissioner of the General Land Office, subject to the same control now exercised by the First Comptroller of the Treasury.

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APPROVED, March 3, 1849.

[The act has no repealing clause.]

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No. 3.

[Act of 21 June, 1860, XII. stat., 71.]

CHAP. CLXVII.—*An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen, be, and they are hereby, confirmed: *Provided*, That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. *And be it further enacted*, That in surveying the claim of said John Scol*ly* it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

SEC. 3. *And be it further enacted*, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstracts marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. *And be it further enacted*, That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

* * * * * *

APPROVED, June 21, 1860.

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## No. 4.

[Act of 25 February, 1869, XV. stat., 275, 440.]

CHAP. XLVII.—*An Act to amend an Act entitled "An Act to confirm certain private Land Claims in the Territory of New Mexico."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the exterior lines of the Cornelio Vigil and Cram St. Vrain claims of eleven leagues each, subject to claims derived from said parties as confirmed by the act of Congress approved twenty-first June, eighteen hunded and sixty, United States Statutes, volume twelve, page seventy-one, shall be adjusted according to the lines of the public surveys, as nearly as practicable, with the limits of said claims, yet in as compact a form as possible; and the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives prior to the passage of this act, who may establish their claims within one year from the passage of this act, to the satisfaction of the register and receiver of the proper land district, shall in like manner be adjusted according to the subdivisional lines of survey, so as to include the lands so settled upon or purchased, and the areas of the same shall be deducted and excluded from the adjusted limits of the claims of said Vigil and St. Vrain respectively; and the claims of all other actual settlers falling within the limits of the located claims of Vigil and St. Vrain shall be adjusted to the extent which shall embrace their several settlements upon their several claims being established either as pre-emption or homesteads, according to law; and for the aggre-

gate of the areas of the latter class of claims the said Vigil and St. Vrain, or their legal representatives, shall be entitled to locate a like quantity of public lands, not mineral, according to the lines of the public surveys, and not to exceed one hundred and sixty acres in one section.

SEC. 2. *And be it further enacted*, That it shall be the duty of the general land office to cause the lines of the public surveys to be run in the regions where a proper location would place the said Vigil and St. Vrain claims, and that the expense of the same shall be paid out of any moneys in the treasury not otherwise appropriated; yet, before the confirmation of the said act of June twenty-first, eighteen hundred and sixty, shall become legally effective, the said Vigil and St. Vrain, or their legal representatives, shall pay the cost of so much of said surveys as enures to their benefit respectively, and that all settlers of the said third class, whose claims may be adjusted as valid, shall have the right to enter their improvements by a strict compliance with the pre-emption or homestead laws.

SEC. 3. *And be it further enacted*, That upon the adjustment of the Vigil and St. Vrain claims according to the provisions of this act, it shall be the duty of the surveyor general of the district to furnish proper approved plats to said claimants, or their legal representatives, and so in like manner to said derivative claimants, which shall be evidence of title, the same to be done according to such instructions as may be given by the commissioner of the general land office.

SEC. 4. *And be it further enacted*, That immediately upon running the lines as provided in section second of this act, the surveyor-general of said district shall notify the said Vigil and St. Vrain, or their agents or legal representatives, of the fact of such survey being made, and said claimants shall, within three months after notice of such survey, select and locate their said claims in accordance with such survey and the provisions of this act and of the act to which this is amendatory, so far as the same is not changed by this act, and shall within said time furnish the surveyor-general with the description of such location, specifying the lines of the same. And the party failing to make such selection and location, in such manner and within such time, shall be deemed and held to have abandoned their claim, and their rights and equities under this act, and the act to which this is amendatory, shall cease and terminate.

SEC. 5. *And be it further enacted*, That in case of the neglect or refusal of the said Vigil and St. Vrain, or either of them, to accept of the provisions of this act, and the act to which this is amendatory, and to locate their said claims, as p ovided therein, no suit shall be brought or proceedings instituted in any of the courts of the United States, by such party or by any one claiming

through or under them, to establish or enforce said claims, or for any cause of action founded upon the same, after six months from the passage of this act.

APPROVED, February 25, 1869.

[The time fixed by s. 1 of the above act for establishing the derivative claims, was extended by the joint resolution below.—]

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No. 5.

[Joint res. of 28 April, 1870, XVI. stat., 373, 663.]

[No. 38.] *Joint Resolution to construe an Act entitled "An Act to amend an Act entitled 'An Act to confirm certain private Land Claims in the Territory of New Mexico.'"*

*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of an act approved February twenty-fifth, eighteen hundred and sixty-nine, and entitled "An act to amend an act entitled 'An act to confirm certain private land claims in the Territory of New Mexico,'" as requires that derivative claimants under Vigil and St. Vrain shall establish their claims to the satisfaction of the register and receiver of the proper land district within one year from the passage of said act, shall be so construed as to authorize the presentation of such derivative claims within one year from the completion and approval of the subdivisional surveys contemplated by said act of twenty-fifth February, eighteen hundred and sixty-nine.

SEC. 2. *And be it further resolved,* That all settlers entitled by said act to the rights of pre-emption or homestead shall have the further time of thirty days, after notice in favor of their respective claims, to file their declaratory statements as pre-emptors or to make entry under the homestead laws, as they may select.

APPROVED, April 28, 1870.

No. 6.

[Revised Statutes of the United States, ed. of 1878.]

SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

First. The census; when directed by law.
Second. The public lands, including mines.
Third. The Indians.
Fourth. Pensions and bounty-lands.
Fifth. Patents for inventions.
Sixth. The custody and distribution of publications.
Seventh. Education.
Eighth. Government Hospital for the Insane.
Ninth. Columbia Asylum for the Deaf and Dumb.

* * * * * *

SEC. 453. The Commissioner of the General Land-Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all [*agents*] [grants] of land under the authority of the Government.

* * * * * *

SEC. 2478. The Commissioner of the General Land-Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

[The title meant by this section is "TITLE XXXII. THE PUBLIC LANDS."—See R. S., p. 388, ed. of 1878.]

23-189

OFFICE SUPREME COURT U. S.
DEC 15 1883
JAMES H. MCKENNEY, Clerk.

# SUPREME COURT OF THE UNITED STATES.

WILLIAM CRAIG, *appellant*,

*vs.*

THOMAS LEITENSDORFER, *appellee*.

No. 652 on docket of Oct. term, 1883.

*On motion of Mrs. Leann S. King, administratrix of her deceased husband, John Q. A. King, to intervene in the supreme court.*

Argument of Leitensdorfer against intervention, by ROBT. H. BRADFORD, attorney and counselor-at-law, of counsel.

In this motion Mrs. King asks this court to substitute her name for that of the appellee Leitensdorfer; or, if that be refused, then to order that she may "intervene herein and be heard by the Court in all subsequent motions and proceedings in this cause, including the final argument on the merits."

The motion should be refused; for

I. IT IS FOUNDED ON A GARBLED TRANSCRIPT, ONE WHICH OMITS MATTERS NECESSARY TO ENABLE THIS COURT TO TAKE AN INTELLIGENT VIEW OF THE MOTION.

The action from which the motion springs, is that of Leann S. King, as administratrix of the estate of her deceased husband John Q. A. King, against John Hallum and Thomas Leitensdorfer. It was instituted as No. 5093 in the district court of Arapahoe county, Colorado, on or about the 31st of December, 1880, to recover a $10,000 fee alleged to be due by Hallum & Leitensdorfer to John Q. A. King, for the services of the latter as associate counsel for Leitensdorfer before the court below in the suit of Leitensdorfer *vs.* Craig. In that suit, Mr. King, Hallum, and the undersigned, were associate counsel for Leitensdorfer; and Hallum, who lived out of Colorado, had obtained an interest in the derivative claim of Thomas Leitensdorfer to part of the Vigil & Saint Vrain or Las Animas grant. In the action of Mrs. King for her husband's fees, Hallum's interest in Leitensdorfer's claim was attached. The action was tried by jury, and Mrs. King got judgment against Hallum & Leitensdor-

fer for the whole amount claimed. Hallum seems to have taken no interest in the case. As for Leitensdorfer, he being unable to give the security, $15,000, for a supersedeas bond, execution issued against him, the sheriff seized and sold his derivative claim and Mrs. King bought it in. But the case is now pending on writ of error, in the supreme court of Colorado, which may reverse or modify the judgment of the state district court. That judgment is exorbitant, as the full transcript of the record on file in the supreme court of the state would show. The district court considered that the value of Mr. King's services depended largely on the value of the Leitensdorfer derivative claim, and G. W. Thompson, one of the witnesses, swore that the tract covered by that claim was worth $400,000; but his testimony, showing that almost all of the good land in the tract was, at the time of the trial, adversely held by other persons, (transcript in supreme court of Col., pp. 105 to 108,) was suppressed by the district court. This suppression was assigned as error by Leitensdorfer, and will perhaps be so held by the supreme court of the state. That the value of Leitensdorfer's claim, as distinguished from the intrinsic value of the land claimed, is far less than $400,000, appears even from the fragmentary transcript filed here with Mrs. King's present motion. For, on p. 15 of the printed motion it seems, that the sheriff, in offering for sale the land in Leitensdorfer's claim, "first offered each quarter section of said land separately; that there were no bids made upon any of said quarter sections so offered as aforesaid except upon the southwest quarter of section five (5) in township thirty-three (33) south, range sixty-three (63) west, and for that quarter section Leann S. King being the highest and best bidder, the same was sold to her for the sum of six dollars."

The whole of Thomas Leitensdorfer's derivative claim covers about 16,000 acres. (Record, Leitensdorfer *vs.* Leann S. King, in supreme court of Col., p. 272.) As the sections of the public land contain, "as nearly as may be, six hundred and forty acres each," (R. S., § 2395, paragraph Third,) and as the ¼ sections must be considered, in law, as containing the one-fourth part of that quantity, (R. S., § 2396, paragraph Third,) and as this separate ¼ section thus sold to Mrs. King for the sum of six dollars, has the Las Animas river running through the middle of it, (see the M. S. transcript in the appeal of Craig *vs.* Leitensdorfer, filed in this court by Craig,) it is fair to assume that the value of the separate quarter section is proportionate to the value of the whole Leitensdorfer tract. Now, 160 acres is the hundredth part of 16,000 acres. Hence, if the 16,000 acres be worth $400,000, then 160 acres are worth $4,000 the hundredth part of $400,000. It follows, that Mrs. King paid $6 for $4,000 worth of property. But, it seems, on p. 16 of her printed motion here, that she

bought in all of the 16,000 acres, less the separate ¼ section, for $10,360. That is to say, a tract which the jury in Mrs. King *vs.* Hallum & Leitensdorfer, believed to be worth $400,000, brought $10,366, and of that sum probably about $366 were paid by Mrs. King to the sheriff in cash, for costs, and the rest was not paid at all. But the sheriff says, (Mrs. King's printed motion here, p. 15,) that he got no bids for any of the ¼s when offered separately, save for the ¼ specified above. So that, according to her own proofs here, the value of the 16,000 acres is nominal, or, at most, $6 a ¼, equal to $600 for the 16,000 acres.

The recklessness of the proceedings in King *vs.* Hallum & Leitensdorfer is further shown by other parts of the sheriff's return whence we have quoted above. The execution was returnable "in ninety days from the date" thereof, *i. e.* from the 24th of January, 1882. (Mrs. King's printed motion, p. 13.) The 90 days expired with the 24th of April, 1882, but the writ was not filed by the sheriff till the 6th of May, 1882. (*Ib.*, p. 16.) Moreover, the thing to be sold was, not the 16,000 acres, which, containing as they do fine water power, and good coal and iron mines, are of great value, but the equitable interest of Thomas Leitensdorfer in the 16,000 acres, an interest which has been much frittered away, and is contingent on many future proceedings, as the record filed here in Craig *vs.* Leitensdorfer will show. Yet the sheriff assumed to sell the land itself. Besides, he sold Mrs. King the west halves of sections 28 and 32, T. 32 S., R. 63 W., and all of section 17, T. 33 S., R. 63 W., (see her printed motion here, pp. 15, 18) which were out of Leitensdorfer's derivative claim, (see transcript in Craig's appeal *vs.* Leitensdorfer,) and a large number of tracts, which, tho' formerly in his claim, had, long before Mrs. King sued him, been relinquished by him, voluntarily or involuntarily, to the U. S., and patented by the U. S. to other persons. Among the tracts thus relinquished and patented are the town site of Trinidad and environs. All of these relinquishments will probably be found in the transcript of Craig's appeal *vs.* Leitensdorfer. But the east halves of secs. 28 & 32, T. 32 S., R. 63 W., tho' part of Leitensdorfer's claim, (transcript, Craig's appeal *vs.* Leitensdorfer,) were not sold by the sheriff at all. Hence Mrs. King cannot represent or supersede Leitensdorfer here.

Again: the full transcript in Leitensdorfer *vs.* Mrs. King, in the state supreme court, would show that Hallum, Mr. King, and the undersigned, were the counsel of Leitensdorfer in his case against Craig, and that King was not leading counsel. Hence, if King's services were worth $10,000, the services of the three counsel in getting a temporary decree in favor of a defeasible title to $10,366 worth of land, are worth $30,000!

On p. 912 of the transcript in Mrs. King's suit against Hallum

& Leitsendorfer, in the supreme court of Colorado, is a letter from her husband to Leitensdorfer, of the 10th of February, 1879, in which he says: "All my labor in the case is on credit. I ask not a cent till all is over." The final decree against Craig whence he has now appealed to this court, was rendered on the 25th July, 1880. (See transcript in that case here.) On the 5th January, 1882, as Craig had not then brought up here the transcript of appeal, it seemed that the decree of 25th July, 1880, would prove final; and so judgment was rendered against Hallum & Leitensdorfer for the $10,000 fee of Mr. King. (Mrs. King's printed motion, pp. 11 and 12.) Afterwards, on the 16th January, 1882, the appeal of Craig *vs.* Leitensdorfer was docketed and dismissed by this court under rule 9. Afterwards, within the two years allowed Craig for appealing by R. S., § 1008, he brought up a second appeal here, which is now pending. Such second appeals are, it seems, allowable. (Yeaton *vs* Lennox, 8 Pet., 123; Steamer Virginia *vs.* West, 19 Howard, 182.) The transcript was filed last term, and it shows that *all is not over*, as the district court of Arapahoe county, Col., assumed in giving judgment against Leitensdorfer. It shows, rather, that no fee at all has yet been earned by or on behalf of Mr. King.

The supreme court of Colorado may yet remand the case of Leitensdorfer *vs.* Mrs. King to the state district court for a new trial, on the principle of Mills *vs.* Scott, 99 U. S., 25, 30. There, Justice Field, delivering the opinion of the court, said: "Where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will, of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose."

As the full transcript in Leitensdorfer *vs.* Mrs. King, in the supreme court of Colorado, would show that her judgment against him was exorbitant, the transcript here in Craig *vs.* Leitensdorfer shows that the judgment is erroneous, inasmuch as the judgment assumes that a decree, which this court may yet reverse, was a final and successful conclusion of the labors of Leitensdorfer's counsel in his suit against Craig. The partial transcript filed by Mrs. King in the present motion, simply contains copies of the writ of attachment, execution, judgment and sheriff's deed to her, in her suit against Hallum & Leitensdorfer, omitting the evidence and pleadings, and leaving the false impression that her judgment against Leitensdorfer is final. Her motion, being founded on such a deceptive and garbled transcript, should be dismissed. Indeed, even had she performed her manifest duty, by filing her a fair transcript of the case of Leitensdorfer against her, in the supreme court of Colorado, this court could not properly consider her motion here without sifting the voluminous trans-

cript filed here, at the last term, in the appeal of Craig *vs.* Leitensdorfer. That transcript is not yet printed.

The question whether Mrs. King's judgment against Leitensdorfer, is liable to reversal by the supreme court of Colorado, is important, for—

II. WHERE A PLAINTIFF IN EXECUTION BUYS IN THE DEFENDANT'S PROPERTY, THE DEFENDANT, ON THE REVERSAL OF THE JUDGMENT, BECOMES ENTITLED TO THE PROPERTY AGAIN.

The contrary of this proposition, is the only point raised by Mrs. King's printed motion. She alleges, p. 4, that, as the state district court had jurisdiction of the parties and matter, and its judgment for Mrs. King is regular, her title, "derived from the sale on excution, is indefeasible, although the judgment may subsequently be reversed." It is important for her to maintain this point, for if the reversal of her judgment against Leitensdorfer will destroy her alleged title to his land, this court cannot allow her to intervene here now as his successor in title. Mrs. King's motion fortifies her above proposition by authorities, all of which we will review.

She first relies upon 2 Washburn on Real property, p. 463, which does not touch the point. Her next citation is Gray *vs.* Brignardello, 1 Wallace, 627, 634. There the buyer was not the plaintiff in execution; and the remark of the court, that buyers generally at a sheriff's sale are not affected by a reversal of the judgment under which the sale was made, is correct. The question, whether, the general rule of protection applies to a purchase by the plaintiff in execution, did not arise in that case and was not discussed by the court. So in McGoon *vs.* Scales, 9 Wallace, 23, 31, the next case quoted in Mrs. King's motion: there Justice Miller, delivering the opinion of the court, said:

"The sale was made while the judgment was in force to one who was no party to the suit, and the reversal of the judgment could not, as is well settled, affect the purchaser."

But the chief reliance of Mrs. King is, South Fork Canal Co. *vs.* Gordon, 2 Abb. U. S. C. C. & D. C. Reports, 479, decided by Justice Field in the U. S. circuit court for the district of California, in October term, 1868. There Gordon brought suit in the nature of a bill in equity against the canal company, to enforce a statute lien for work and material furnished by him in making part of the canal. The decree adjudged a lien on the whole canal, and a sale of the whole, which was made. The property was bought by Hosmer, an assignee of Gordon. On appeal to this court by the company, the decree was reversed, and the court, (justices Field, Miller and Greer dissenting,) held that Gordon's lien covered, not the whole canal, but only that part which he had made

This court then remanded the cause to the court below, with instructions to enter a decree in conformity with the opinion of the majority of this court. (Canal Co. *vs.* Gordon, 6 Wallace, 561, 572.) Afterwards, in that court, Justice Field made the decision quoted in Mrs. King's printed motion, p. 6, holding that his previous decree, tho' reversed by the supreme court, was efficient to protect permanently all purchasers at the sheriff's sale of the whole canal, whether parties or strangers to the decree.

But in that case, the amount of the pecuniary decree against the canal company was not reduced by this court, and the canal was bought, not by the plaintiff in execution, but by an assignee of the plaintiff. Moreover, in the subsequent case of Galpin *vs.* Page, 18 Wallace, 350, 373–4, in which Justice Field pronounced the opinion of the court, he stated the doctrine of the current of authorities, which is in opposition to his views in South Fork Canal Co. *vs.* Gordon, and adopted it. In Kentucky, the plaintiff's title, held under execution sale, is not devested by a reversal of his judgment. (Parker *vs.* Anderson, 5 T. B. Monroe, 445, Oct. term, 1827; Benningfield *vs.* Reed, 8 B. Monroe, 102, term of 1847–'8; Gossom *vs.* Donaldson, 18 B. Monroe, 230, summer term, 1857.) These three Kentucky cases, and the case of the South Fork Canal Co. *vs.* Gordon, are relied on by Mrs. King's printed motion, pp. 5 and 6; but they are all reviewed in Galpin *vs.* Page, where Justice Field concluded that the current of authority was against them. They are the only cases we find opposed to the general doctrine, that "If lands have been set off to plaintiff under execution, or if he has purchased real or personal estate, the defendant, on the reversal of the judgment, becomes entitled to such real and personal property." (Freeman on Executions, § 347, San Francisco, 1880.) Mr. Freeman, with industry and ability, has collected and compared all the authorities, and he shows that the rule just quoted from his treatisé is the law in Missouri, Nebraska, New York, California, Wisconsin, Louisiana, Iowa, Ohio, Illinois, Maine, Massachusetts, Texas, England, and elsewhere, and was enforced in the reign of queen Elizabeth.

Mrs. King's printed motion, p. 8, cites Jackson *vs.* Lamping, 34 Cal., 293, and Reynolds *vs.* Hosmer, 45 Cal., 616, to show that, in case her judgment against Leitensdorfer should be reversed, he would simply have his option "to take the land or bring his action for the money value." This is not so. The rule is that the reversal of a judgment does, of itself, devest the title of a plaintiff who has purchased. (Freeman on Ex., § 347.) The two California cases just referred to are to the effect, that the sale remains in force until vacated on motion, and that the defendant, instead of making such motion, may affirm the sale and sue the plaintiff for the damages suffered thereby. But this is local, not general law, as Mr. Freeman clearly shows.

III. MRS. KING IS NOT SOLE OWNER OF LEITENSDORFER'S DERIVATIVE CLAIM, AND HENCE CANNOT PROPERLY REPRESENT OR SUPERSEDE HIM HERE.

On the 16 April, 1877, John Hallum conveyed by relinquishment to Josephine Farnsworth, of Saint Louis, Mo., part of the Leitensdorfer derivative claim. On the 18th of December, 1880, Thomas Leitensdorfer conveyed by relinquishment to Josephine Farnsworth, who is his sister, all of his interest in the Vigil & Saint Vrain or Las Animas grant, which interest includes the derivative claim of Leitensdorfer as held under those original grantees. These conveyances antedate the suit by Mrs. King *vs.* Leitensdorfer, are absolute in terms, and seem to have been made to enable the grantors to raise funds for the prosecution of the derivative claim of Leitensdorfer. Had Mrs. King filed here a full transcript of the case of Leitensdorfer, plaintiff in error, *vs.* Mrs. King, this court would probably have evidence of the above conveyances and of others of a like character, showing that Josephine Fansworth is now part owner of Leitensdorfer's derivative claim. It may be alleged that she holds all her title in trust for Hallum & Leitensdorfer. It is believed by us that a full transcript in Lietensdorfer, plaintiff in error, *vs.* Mrs. King, would controvert such an allegation; but if Mrs. Fansworth holds her entire interest in trust, still the legal title is in her, and hence Mrs. King should not be allowed to represent here the whole title of Thomas Lietensdorfer. Mrs. Farnsworth would have a better pretence of right to intervene.

If the complete transcript in Leitensdorfer, plaintiff in error, *vs.* Mrs. King, were here, it would show, in conjunction with the transcript in Craig's appeal *vs.* Leitensdorfer, that, long before Mrs. King sued Leitensdorfer, he had, from time to time, relinquished, by deed to the U. S., many small tracts in his derivative claim afterwards entered by pre-emptors or homesteaders; and would probably show that like relinquishments were obtained from Leitensdorfer by force or fraud, or both. If Mrs. King, then, be allowed to intervene here to defend Leitensdorfer, this court might be overwhelmed by like demands to intervene on the part of the U. S., or their grantees: and it would be hard for the court to consistently refuse an intervention against Leitensdorfer, if urged by persons holding title under the alleged illegal or fraudulent relinquishment from him; for the interest of such persons lies in maintaining Craig's title and so defeating Leitensdorfer's, and in showing that the U. S., the immediate vendors of those persons, had a perfect unincumbered title to Leitensdorfer's claim independently of his legal or illegal relinquishments to the U. S.

It has been shown, under our proposition I, that, according to

the transcript filed with Mrs. King's motion, she did not buy the E. halves of secs. 28 & 32, T. 32 S., R. 63 W., tho' they are part of Leitensdorfer's claim.

IV. IF MRS. KING WERE SOLE OWNER OF LEITENSDORFER'S DERIVATIVE CLAIM, SHE SHOULD NOT SUPERSEDE HIM HERE: FOR, ON A LIKE PRINCIPLE, PERSONS SUCCEEDING WHOLLY OR PARTLY TO HER TITLE MIGHT AFTERWARDS, FROM TIME TO TIME, INTERVENE HERE AND SUPERSEDE HER OR EACH OTHER.

Mrs. King moved, before the general land office, to intervene in Leitensdorfer's claim, and when the commissioner, on the 27th June, 1883, refused the motion, Mrs. King appealed to the secretary of the interior. The appeal was allowed by the commissioner on the 16th of November, 1883, (Copp's Land Owner of 1st Dec., 1883, volume 10, p. 269,) and is now pending before the secretary who, if this court allows the intervention here, will probably reverse the commissioner and allow Mrs. King to supersede Leitensdorfer in his derivative claim now pending on appeal before the general land office. In such case, Mrs. King, as the adjudged successor to Leitensdorfer's claim, would be in a position to sell to squatters on the Leitensdorfer claim her relinquishments of title in favor of the U. S., thus enabling the squatters to enter the relinquished tracts under the pre-emption and homestead laws. But if, after such relinquishments, this court should ultimately, in Craig's appeal *vs.* Leitensdorfer, reverse the decreee of the circuit court against Craig, or the supreme court of Colorado should reverse the judgment of Mrs. King *vs.* Leitensdorfer, it would then be found that Mrs. King's apparent title to Leitensdorfer's claim was void from the beginning, and that the squatters had received no consideration for the money paid by them to Mrs. King for her relinquishments to the U. S.

This court should not, in a case in equity, countenance an intervention which might lead to such imposition on ignorant settlers. Mrs. King's counsel may disavow any design to speculate in this way on those settlers; but such disavowal by counsel could not estop her from embarking in the inviting speculation. It is well also for this court to consider whether, if Mrs. King's intervention be allowed here, the various settlers, holding under the future relinquishments which we have assumed above, might not also clamor to intervene here, on one side or the other, in Craig's appeal *vs.* Leitensdorfer. It is certain that if she should relinquish her title, in whole or part, immediately to one or more persons, instead of mediately through the general government, they and their grantees *ad infinitum* would have the same pretext for intervening here which she now claims. Will this court open the door to such circuity and confusion?

V. IF MRS. KING WERE SOLE AND PERPETUAL OWNER OF LEITENSDORFER'S DERIVATIVE CLAIM, SHE SHOULD NOT INTERVENE HERE; FOR THE DECREE APPEALED FROM BY CRAIG SIMPLY ANNULS HIS TITLE, WITHOUT PRETENDING TO CONFIRM LEITENSDORFER'S—A DUTY WHICH DEVOLVES ALONE ON THE EXECUTIVE DEPARTMENT.

The final decree of the 25th of July, 1880, by the U. S. circuit court for the district of Colorado, in the suit of Leitensdorfer *vs.* Craig, is this:—

"It is therefore ordered, adjudged and decreed that the decision or award of the Register and Receiver of the lands described in the bill and pleadings of date the 23d of February, 1874, in favor of defendant William Craig, is fraudulent and void.

"And it is further ordered, adjudged and decreed that the patent for the said lands issued to defendant Wm. Craig on the 8th day of January, 1878, be and it is hereby declared and decreed to be nuil and void and that the approved plot or plots delivered to defendant Wm. Craig as evidence of title to the lands described in the bill by Wm. Campbell, Surveyor General, be and the same are hereby declared and decreed to be null and void."

Craig alone appealed from this decree.

If this court, in ultimately affirming this decree, should also usurp executive power and confirm Leitensdorfer's derivative claim now pending before the commissioner of the general land office for confirmation, (Copp's Land Owner, vol. 1, pp 122, 165. Copp's Public Land Laws, 611; Copp's Land Owner, 1 Dec., 1883,' vol. 10, p. 269; Opinions of Attys. Genl., vol. 15, p. 94;) Mrs. King might now with some slight show of reason, intervene here and ask that she be declared the confirmee, the real and nominal holder of the legal title, instead of Leitensdorfer. But, as the final decree of this court can do no more than annul or sustain Craig's title to a remote tract in the Las Animas grant, Mrs. King has no just ground for intervention. The case can proceed better without than with he. Leitensdorfer is able to stand in judgment and "to comply effectively with the decree of the court," and it has been held that such faculty on the part of the original party to the suit, supersedes the necessity of his vendee's intervention even in the trial court. (Secombe *vs.* Steele, 20 Howard, 94, 105–6.)

VI. IF MRS. KING WERE SOLE AND PERPETUAL OWNER OF LEITENSDORFER'S DERIVATIVE CLAIM, AND THE DECREE APPEALED FROM BY CRAIG CONFIRMED LEITENSDORFER'S TITLE, MRS. KING

SHOULD NOT INTERVENE HERE; FOR AN AFFIRMANCE OF THAT DECREE HERE WOULD, WITHOUT HER INTERVENTION, ENURE TO HER BENEFIT BY WAY OF ESTOPPEL.

The settled rule is that an executive, legislative or judicial confirmation of a land claim in the name of the original owner, enures to an intermediate vendee, who, as the equitable owner can, by bill in equity, compel the nominal confirmee or his heirs to convey to the vendee the legal title. In U. S. *vs.* Percheman, 7 Peters, 51, the record disclosed (*ib.* p. 57,) that Juan Percheman, the Spanish grantee, had, before suing the U. S. for confirmation of title, conveyed his grant to Francis P. Sanchez; but Chief Justice Marshall, in affirming the decree of confirmation by the court below, said:—

"The court does not enter into the inquiry, whether the title has been conveyed to Sanchez or remains in Percheman. That is a question in which the United States can feel no interest, and which is not to be decided in this cause." (7 Peters, 97.)

The same convenient rule is applied to land grants in California, (U. S. *vs.* Sutter, 21 Howard, 170, 182,) to patents on the location of military bounty land warrants, (Lessee of French *vs.* Spencer, 21 Howard, 228, 239,) and to ordinary entries of the public land, (Ross *vs.* Barland, 1 Peters, 655.) The patent relates back to the entry, and takes date with it, so that "an intermediate *bona fide* alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity could afford him." (Lessee of French *vs.* Spencer, 21 Howard, 240.)

The rule also applies to confirmed land claims in the former province of Louisiana, (recited, Morehouse *vs.* Phelps, 21 Howard, 294, 304,–'5.) In Landes *vs.* Brant, (10 Howard, 348,) the court said:—

"In every case when this court has been called on to investigate titles, where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmee, and his heirs or devisees, in the same manner as if he had been vested with the legal title at the date of conveyance." (10 Howard, 374.) And see Daniel Clark's case, Copp's Pub. L. Laws, 494.

In consequence of the ample protection of intermediate alienees, and of the inconvenience and confusion which would result were they allowed to intervene and claim the patent, the rule of the interior department is, to refuse issuing the patent in their names save where such right is recognized by express statutory provisions, (7 Copp's Land Owner, 85.) In Leitensdorfer's claim there is no such provision.

VII. No rule, statute or precedent authorizes an intervention here by Mrs. King.

In Mechanics' Bank *vs.* Seton, 1 Peters, 299, 310, Justice Thompson said, "it is a well settled rule, that the Court is not bound to take notice of any interest acquired in the subject matter of the suit pending the dispute." The court referred to there was the trial court. So Justice Campbell, in Secombe *vs.* Steele, 20 Howard, 94, 105, said, referring to an intervention in the trial court by buyers, at sheriff's sale of the lands involved, *pendente lite*:—"Suits would be interminable, if the rights of the parties could be disturbed by mesne conveyances, and a necessity imposed for the introduction of other parties upon the record. The apparent exception to the rule arises when an event occurs which deprives the party on the record not only of his interest in the subject of the suit, but also of his faculty to comply effectively with the decree of the court. In such a case, additional parties are necessary to enable the court to make an operative decree." (20 Howard, 105, '6.) And see Steele *v.* Taylor, 1 Minn., 274.

Of course this rule of exclusion applies with more stringency in an appellate court. Chief Justice Taney said: "It is very well settled in all common-law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court." (Payne *vs.* Niles, 20 Howard, 219, 221.) In Pacific R. R. of Missouri *vs.* Ketchum, 95 U. S., 1, where a motion was made in this court, by the appellant, for a rule upon the appellee to show cause why a receiver should not be appointed pending the appeal, Chief Justice Waite denied the motion, saying: "Appeals in equity are heard upon the pleadings and proofs below. No new evidence can be admitted, and the pleadings cannot be amended in this court." (95 U. S., 3.)

Even in proceedings in prize it is held that persons who were not in any way parties to the litigation in the district court, and were neither appellants nor appellees, cannot intervene here.

"Such an application" said the court, in the William Bagley, 5 Wallace, 377, 412, "cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress."

And in a Kentucky land case, which came here on appeal from the U. S. circuit court for that district, the appellees moved here for a rehearing below on the ground of material evidence discovered since the case was decided there; but the court, *per* Taney, C. J. refused the motion: "It is very clear," said he, "that affidavits of newly discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it for testimony to influence the judgment of this court sitting, as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal," (Russell *vs.* Southard, 12 Howard, 139, 159.) In U. S. *vs.* Davenport, 15 Howard, 1, and U. S. *vs.* Patterson, *ib.*, 10 the appellees had sued the U. S. for confirmation of Louisiana land claims, under act of 17 June, 1844. (5 Stat., 676.) After the expiration of that act, strangers submitted a motion here for leave to intervene and claim the lands under a right derived mediately from the original grantees before the suits were filed below. This court, *per* Campbell, J., confirmed the claims, refusing the motion on the grounds that the strangers, not being parties, could not be hurt or benefited by the proceedings in this court; that the statute had expired, and that the facts in the record showed no reason to believe that those strangers had any title. The court added: "If, therefore, it was compatible with the constitution and practice of this Court for a person to intervene here in a litigation to which he was no party in the court of original jurisdiction, we find nothing to authorize it in the present instance." (U. S. *v.* Patterson, 15 Howard, 12.)

Indeed the statute declares that, on appeals in equity, "no new evidence shall be received in the Supreme Court, except in admirality and prize causes." (R. S., § 698.)

In short, Mrs. King's motion is solved by the maxim *pendente lite nihil innovandum.* (Secombe *v.* Steele, 20 Howard, 14, 106.) We can find no instance on record in which this court has ever entertained a motion like this. Interventions here have been invariably refused. *Cursus curiæ est lex curiæ;* "and where a practice has existed it is convenient to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience." (Broom's Max., 98–'9.) These were the views of Lord Eldon and Lord Ellen-

borough. (*Ib.*) Besides, Mr. Benjamin F. Butler, counsel for Craig here in his appeal against Leitensdorfer, is distinguished for kindness to women, and especially to widows; and we are persuaded that he would rather wreak the rough bludgeon of his logic on the hardy, horny-handed, iron-sinewed frontiersman, Thomas Leitensdorfer, than upon the gentle widow, Mistress Leann S. King.

This is a motion by Mrs. King to intervene. We think it should have been a motion for a rule on Leitensdorfer to show cause against the intervention. As it is, we ask that the motion be denied.

ROBT. H. BRADFORD,

*Of Counsel for Thomas Lietensdorfer.*

*8th & F sts. N. W., Washington city,*

*Saturday,* 15 *Dec.,* 1883.

# In the Supreme Court of the United States.

WILLIAM CRAIG, *Appellant*,
*vs.*
THOMAS LEITENSDORFER, *Appellee.*
No. 48.—Oct. T. 1885.

## Answer to Motion of Appellant.

Now into this Hon. Court by their attorneys, R. H. Bradford and Chas. W. Hornor, come Thomas Leitensdorfer and Thomas J. Allen, and in answer to the motion of appellant to show cause why an order and decree should not be entered upon a stipulation filed herein of May 4th, last, except and say:

*First.* That the Court has already passed upon the said motion and stipulation at the last Term of Court and denied the same

*Second.* That it is the duty of the appellant to file a complete record and have it printed, and until then, your Honors will not hear the case. A complete record herein has not been filed nor has any part of it been printed either for the use of the Court or the counsel; hence the case cannot be tried when reached, nor this motion or rule at the present time.

*Third.* That appellant has no legal right to proceed by rule on the said stipulation without the authority in writing of the appellee and all those holding the beneficial interest.

*Fourth.* Mrs. King has a vested right to be heard on the trial of the appeal, if any be had on the merits. Her rights cannot be impaired by Hallum.

Wherefore, respondents pray that these exceptions be sustained and this rule dismissed at appellant's costs.

And should these exceptions be overruled, then these respondents deny all and singular the facts and allegations in the motion contained, and they specially deny the authority and power of John Hallum to appear in this case for any party in interest as appellee, or to consent to any such agreement as set forth in appellant's motion, and they pray to be dismissed with costs.

ROBERT H. BRADFORD,
CHARLES W. HORNOR,
*Of Counsel.*

[EXHIBIT A.]

JAN. 20TH, 1874.

JOHN HALLUM,
Attorney at Law,
Cor. Fifth and Olive streets,
St. Louis, Mo.

ROBERT H. BRADFORD, Esq.
*Washington City, D. C.:*

DEAR SIR: I have two very important cases, one involving $100,000 and one $50,000, which I desire to present to the Commissioner of the General Land Office, and through him to the Att'y Gen'l of the U. S., for the purpose of inducing the Commissioner to explain and modify the rulings of that official in the shape of instructions to the Register and Receiver of the local Land Office at Pueblo, Colorado.

The cases arise under the treaty of Guadalupe Hidalgo and the confirmatory acts of Congress giving effect to the treaty obligations of the Government.

I have an elaborate argument prepared, which I will send you by express if we can agree upon the fee to be paid you. The parties are poor, and unable to advance anything until their title is settled. I am fully of the opinion that their title is now perfect, but the Register and Receiver in their *ex officio* capacity as Commissioners, *assume* the authority to annul or reject a claim already *confirmed* by Congress, and it is on this point I want the Instructions of the Commissioner of the General Land Office modified. If you can attend to the matter at Washington I will see you well paid if we succeed; if we fail (which I scarcely think possible — at least it is improbable) then we both lose our services.

Please let me hear from you at your earliest convenience.

JNO. HALLUM.

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[EXHIBIT B.]

ST. LOUIS, *Feb. 23d*, '74.

TO ROBT. H. BRADFORD, ESQR.,
519 *7th st., Washington City, D. C.:*

What progress have you made with the Leitensdorfer & Bent claims. Please let me know at your earliest convenience.

Yours truly,

JNO. HALLUM.

[EXHIBIT C, press copy.]

519 7TH ST. N. W., WASHINGTON, D. C.,
*Thursday*, 26 *F.*, '74.

Mr. JNO. HALLUM,
*5th and Olive streets, St. Louis, Missouri:*

MY DEAR SIR: Yr. P.-C. card of the 23d inst. came last evening, in the cases of Leitensdorfer & Bent. The adjustment of the Las Animas grant, and of the application of the probate judge of that county for the *town site* of Trinidad, is suspended, awaiting the report of the R. and R. at Pueblo, to the Commissioner, under the acts of 21 June, 1860, (XII Stat., 71, c. 167,) and 25 Feb'y, 1869, (15 Stat., 275, 440, c. 47.) The Comm'r will then revise the report, and decide our cases, after argument by me. From his decision an appeal will of course lie to the Secretary of the Interior. In the absence of the report of the R. and R., I cannot satisfactorily examine yr. cases. The Att'y Gen'l would not give any opinion on them till they come regularly before the Secretary. I incline to the opinion that the R. and R. had jurisdiction of them. Please refer me to any evidence showing that Eugene Lertensdorfer and Charles Bent, under their titles to their respective *undivided* 1-6s, took and held possession with the consent of Cornelio Vigil and Ceran Saint Vrain. In a country where land passed by parol, or verbal contract, such consent, I incline to think, would change the titles of Leitensdorfer & Bent to a divided interest, and so obviate the objection which it *seems* the R. and R. have made to yr. cases.

Yr. letter to the Comm'r of 27 Dec'r, 1873, in division G, is the only one I find. It is about the Trinidad town site, but conveys no caveat. If you write any others, or file any caveats, tell me the dates and I will examine them.

The agent to investigate the conduct of the R. and R. reported to the Comm'r. On the 27 Jan'y, 1874, the Com'r wrote the Secretary, reviewing the report and urging the removal of the R. and R., which, I have little doubt, will soon be done. On the 11 Feb'y, 1874, the register, Mr. Stanton, wrote to the Secretary of the Interior, answering the Commissioner, with asperity. The Commissioner has just written the Sec'y again, at length, enforcing his former views and recommendations. He scourges Stanton.

If you have any papers or memoranda illuminating yr. cases, please send them. I concur with yr. argument before the R. and R. on all yr. points save that of jurisdiction. The hinge of the cases is this: Can the holder of an *undivided* title be an actual legal settler of any specific tract, under the acts of 21 June, 1860, and 25 F., 1869?

Send me any *plats* you may have of these claims. Fear no

surprise. I will keep pace with the cases, and be ready for emergencies. Can't you pay me a moderate retainer? The bankruptcy of my southern clients have reduced my purse very low.

Yours truly,

ROBT. H. BRADFORD.

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[EXHIBIT D.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., Sept.* 18, 1874.

E. A. F.

R. H. BRADFORD, Esq.,
*Washington, D. C.:*

SIR: I transmit herewith certified copies of certain papers in the matter of the case of Thomas Leitensdorfer, derivative claimant under Vigil and St. Vrain, within the exterior limits of the Las Animas grant in Colorado. In consequence of your personal labor in the preparation of this transcript the cost of same will only be $1.00, the receipt of which is hereby acknowledged.

Very respectfully,

S. S. BURDETT,
*Commissioner.*

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[EXHIBIT E.]

OFFICE OF HALLUM & ENGLAND,
ATTORNEYS AT LAW,
LONOKE, ARK., *Jan. 7th*, 1877.

[To EUGENE LEITENSDORFER:]

MY DEAR COL.: Your letter of the 4th, enclosing King's and Shackelford's, came to-day. I shall not write to either of them about printing their briefs. If they wish to print them let them do so. It was *distinctly understood* between them and me, when I was in Denver, that all briefs were to be sent to Bradford. Mr. Bradford's will be *the brief* in the case. So much am I impressed with his ability that I have not prepared a brief, because I *know* his will be full, able and exhaustive. I wish I could aid you, but it is impossible.

* * * * * * * *

Your friend,

JNO. HALLUM.

[EXHIBIT F.]

LAW OFFICE OF YEAMAN & JOHN,
TRINIDAD, COL'O, *June 12th*, 1878.

ROBERT BRADFORD, Esq.,
*Washington, D. C.:*

DEAR SIR: Herewith I hand you letter from surveyor-general of Colorado.

Please give me full instructions in the matter, and the manner in which I shall proceed in this business.

Very truly yours,
THOMAS LEITENSDORFER, *Y.*

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[EXHIBIT G, press copy]

MOND., 17 *June*, '78.

MR. THOS. LEITENSDORFER, *Trinidad, Col.,*
*Under cover to Eugene Leitensdorfer, South St. Louis, Mo.:*

Yours of the 12th inst. came this day, with one from the surveyor-general of Colorado to you of the 1 inst.

My knowledge of yr. cases causes me to think that the only serious question in it is one of boundary. The Commissioner inclines to think that the S. E line of the grant is a *straight* one, running from the mound in the interior to the Arkansas river, below the mouth of the Las Animas. If this be so, yr. land would be left out of the grant, and so would the valley of the Las Animas river, which I think was not the intention of the grant. I think the intent of the grant was, that its lower side line should follow and *include* the Las Animas valley. If you can find any man now living *who can identify that line, and the point in the interior whence it ran*, produce him before the surveyor-general at the time and place mentioned by the latter. If you can find no such person, meet the surveyor-general yourself to cross-examine the witnesses whom others may produce before him. I doubt if the lower back corner of the grant can be identified. That, and the lower front corner, and the intervening line, are all that you are interested in. I send this to yr. brother, that he may read and forward, and add suggestions of his own. I return the surveyor-general's letter.

ROBT. H. BRADFORD.

[EXHIBIT H.]

MONDAY MORNING, DENVER, COLO., *Nov.* 19, 1878.

ROBERT H. BRADFORD,
*Att'y at Law, Washington City, D. C.:*

MY DEAR MR. BRADFORD: I arrived here last night, and find yours of the 13 to me, under cover of one to Gov. King. The Gov. informs me that another letter from you to me was received and forwarded to Trinidad, in which you oppose any adjustment with Craig. This letter has not yet reached me, but will by to-morrow's mail.

No accommodation will be entered into with Craig. I had a short interview with him yesterday at Pueblo. The result was by me a *repudiation of his offers* and an abrupt ending of negotiations.

You are *mistaken* about there being no printed rule in the Gen'l L. Office permitting assignees to prosecute claims for land in the names of the assignors. I have a copy in my office at home, sent to me by you about three years ago. It is impossible for me to be mistaken about this. I was much interested in the rule. It is locked up at home, and no one can get to it. Craig's counsel place much stress on the fact that Leitensdorfer, without reservation, has conveyed to me all of his interest in the grant, and that he is no longer interested in the subject-matter of the suit. I absolutely own 7-16 of the claim and Mrs. Farnsworth holds 9-16 partly for herself absolutely and in trust for Thomas Leitensdorfer, the claimant, but the trust does not appear on the face of the conveyance—the proof will show this. I have just written to Eugene and Thomas Leitensdorfer at Trinidad, directing them to send you a *draft immediately* to pay for transcript. I regard it as highly important to have this. I have copies of many conveyances from Craig to Golden and from Golden to Moffit, *Trustee*, and many others, all tending to prove very much and very great fraud. On Saturday next I shall take the deposition of Moffitt, and if he swears to what he says he will it will drive and clinch the last nail in Craig's coffin. Moffitt says ½ of these lands conveyed to Golden were conveyed to him to pay a debt of $15,000.00 which Cook owed him; that the other half is held as *trustee*, but whether for Golden or Stanton he does not know; that Golden, at the time these conveyances were made, was utterly insolvent.

I have ordered a number of certified transcripts of judgments against Golden, and *nulla bona* returns on executions founded thereon, and copies of indictments against Stanton and Cook.

I have just written to Thompson, telling him to send you $25.00 to pay or part pay for transcript ordered a few days ago. You may rely on his sending it as soon as he gets my letter.

What testimony do you propose to take in Washington? If any, be quick about it. Craig stands on the defensive, and says he is ready any day for trial. Court meets 3 Dec., so we have no time to loose in getting ready.

I have not yet discharged Judge S., but will withdraw from him gradually and as easily as possible.

In haste, your friend,

JNO. HALLUM.

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[EXHIBIT I, telegram.]

Dated TRINIDAD, COL., 21 *Nov.*, 1878.

Received at ———. 2 P.

To R. H. BRADFORD, *8th and F:*

I mailed you draft for fifty dollars to pay expenses.

THOS. LEITENSDORFER.

10 Pd 9.

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[EXHIBIT K.]

TRINIDAD, *Dec.* 21, 1878.

Mr. R. H. BRADFORD, *Attorney and Counsellor at Law,*
*Corner 8th and F streets, Washington City, D. C.:*

MY DEAR SIR: Yours of the 14 inst. to Mr. Hallum was forwarded to me, in which you say that my brother had better send you fifty dollars. You will please find enclosed check for twenty-five dollars, and in the course of ten days will send you twenty-five dollars more. We are hard pressed; the cost of the suit is more than we expected. So far we have paid all the costs. Accept our kindest regards.

Yours truly,

EUGENE LEITENSDORFER,
*Agent for Thomas L.*

P. S.—Please acknowledge the receipt of checks.

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[EXHIBIT L, press copy.]

FRIDAY, 27 *Dec.*, 78.

Mr. THOS LEITENSDORFER,
*Care Eugene Leitensdorfer, Trinidad. Col.:*

Mr. Eugene Leitensdorfer's of the 21 inst. came this day, with $25 on yr. acct. to pay for evidence, &c., in yr. case *vs.* Craig *et al.* Thanks.

Yrs., ROBT. H. BRADFORD.

[Exhibit M.]

Denver, Col., *Jan.* 21*st*, 1879.

Robt. H. Bradford, *Atty. at Law*,
*Washington, D. C.:*

Dear Bradford: Yours of the 10th enclosing brief in our case on the subject of *interest* came last night, also letter returning Com'rs Instructions of 23 Aug., '73. Thanks for the Brief. The testimony on the subject of interest is full. I did not fully understand the interest of Thos. Leitensdorfer when I wrote to you. On consultation with Mrs. Farnsworth *after* writing you she informed me that she owns ⅛; Thos. 7-16. I own the remainder. Her deposition and that of Eugene and myself are on file and show *fully* the *trust* in Mrs. F. for her brother Thomas; that he *urgently* requested the apparent title to be conveyed to others, because his life was in great danger. He was then lying out in the bushes to keep out of the way of a *threatened mob;* had been out for three months. Thomas thought that if it was understood he was no longer owner of the claim that the threatened violence would not fall on him. It also shows that he has continuously lived on the claim, and has, *after the danger passed off*, exercised acts of ownership and control over the claim. Mrs. F. and Eugene and myself in our depositions show these facts, and Mrs. F. swears she holds in *trust* for Thomas 7-16; that the trust was not expressed on the face of the deeds to me and from me to her, because Thomas so requested them to be made; that if the trust had been set forth on the face of the deeds the very object of the trust would have been defeated in so far as it was designed to have it appear ostensibly that he was not interested in the claim. The proof further shows that his fears were well founded—that a mob tried to hang me because I was the ostensible owner of the claim. The deeds are filed in evidence.

I have no earthly fear of the enemy's objections on the score of interest.

As additional authority to those you furnish, see Story's Equity Pleading, (an admirable work,) §§78, 79, 81, 89, 96, 351, 351*a*, 156.

There is no sufficient allegation of a *defect of parties*, asserting title to the land.

Our bill simply alleges an equity in Leitensdorfer.

We are not invoking the power of the Court to establish the *legal title* to our claim, that is in the sovereign—the sovereign cannot be made a party against his consent. In this connection, in answer to the suggestions of Dillon and intimations in his *wisha washa* opinion overruling the demurrer, I shall simply answer that it is a legal impossibility to make the sovereign a

party—that because others not before the Court are or may be *interested in the question* is no reason why they should be made parties inasmuch as the *legal title* cannot be disposed in this proceeding, and I regard this reply as in a nutshell—that it cannot be overturned. The interest of *other parties* is too indirect and remote to entitle them to be heard—especially is this so when the point is insisted on *by Craig*. If these other parties were asking to be made parties, the question might present some show of plausibility, but in the present aspect of the case none whatever. It is a pretty attitude for Craig to assume, the championship of Mrs. Farnsworth or myself. The doctrine of *champerty* has no application to our case.

Yesterday I urged the Court to take up our case on the 23d, but cases *at law* requiring jury trials have been set, and we are required to wait perhaps 10 days longer.

Before now you have been advised that I have received tabulated statement of filings on our claim and patents issued; it was "snow-bound" a few days. I confidently think we are in trim for the final issue; I have no fears whatever.

Your friend,

JNO. HALLUM.

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[EXHIBIT N.]

TRINIDAD, COLORADO, *May 12th*, 1880.

MR. ROBERT H. BRADFORD:

Please find inclosed check number 16833, New York, for the sum of twenty dollars and thirty cents.

Your friend as ever,

THOMAS LEITENSDORFER.

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[EXHIBIT O.]

OFFICE OF JOHN HALLUM, ATTORNEY AT LAW,
LONOKE, ARK., *Jan. 13th*, 1882.

ROBT. H. BRADFORD, *Att'y at Law*,
8 *and F sts., Washington, D. C.:*

DEAR SIR: I received your last letter when on the eve of leaving Denver. I arrived home 3 or 4 days ago, and have been quite unwell. I admire your candor, even if it is indulged at my expense. I differed with you, and indulged in the same candor you do. Perhaps my expressions about the Craig case were stronger than intended, or construed in a light less flexible than intended. At all events, your ability has always been rec-

ognized by me, and I have on many former occasions fully attested my appreciation of your abilities.

When will the appeal in Craig's case be dismissed? Can I not aid you in having the case in the Land Office disposed of at an early day. I have many friends—Senators and Representatives in Congress—who will lend their influence to have the case disposed of, and I'm of the impression that it would be well for me to go to Washington, in the next 30 days, to invoke this assistance. What do you think of the idea? Please give me an early answer, and oblige—

Yours truly,

JNO. HALLUM.

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[EXHIBIT P, press copy.]

THURSDAY, 26 *Jan'y*, '2.

Mr. JNO. HALLUM, *Lonoke, Ark.:*

DEAR SIR: Yrs. of 20 ult., from Denver, came 26 ult., and was attended to. Yrs. of 13 inst. came 16 inst., when I was very busy, as I am yet. Craig's appeal was, on my motion, docketed and dismissed with costs on 16 inst. by the S. C. U. S.; but the rule is, not to issue the mandate till the end of the term. I sent you the Washington Post, containing notice of the dismissal of the case.

I have no idea that the commissioner or secretary, contrary to principle and practice, will take up Leitensdorfer's appeal until you get the court below to actually revoke and cancel Craig's plat and patent. Hence I don't think you could do any good by coming here before that is done; save that you would then become convinced of the absolute necessity of canceling Craig's title before our appeal to the Com'r can be heard. I will write again soon.

Yrs. truly,

ROBT. H. BRADFORD.

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[EXHIBIT Q.]

ST. JAMES HOTEL, * * *
WASHINGTON, D. C., *Jan. 9th*, 1885.

MY DEAR BRADFORD: I labored hard to keep my appointment with you at 3.30 P. M., and much regret that I was unable to do so,—was detained by urgent engagements which lasted much longer than I anticipated when I made them. I am called home, and leave at 10.10 P. M.

I am very truly your friend,

In haste, JNO. HALLUM.

[EXHIBIT R.]

## Warranty Deed.

This indenture, made on the tenth day of April, A. D. one thousand eight hundred and eighty-two, by and between Josephine Farnsworth, of the city of St. Louis, State of Missouri, party of the first part, and Thomas J. Allen, of the county of Jackson, in the State of Missouri, party of the second part:

Witnesseth: That said party of the first part, in consideration of the sum of twenty thousand dollars, to her paid by the said party of the second part, (the receipt of which is hereby acknowledged), does by these presents grant, bargain and sell, convey and confirm, unto the said party of the second part, his heirs and assigns, the following described lots, or parcels of land, lying, being and situated in the county of Las Animas and State of Colorado, to-wit: All the west half of section thirteen, (13,) all of sections twenty-two, (22,) twenty-three, (23,) twenty-four, (24,) and twenty-seven, (27,) the east halves of sections twenty-eight (28) and thirty-two, (32,) and all of section thirty-three in township thirty-two, (32,) south of range sixty-three, (63,) west of the sixth principal meridian; also sections five, (5,) seven, (7,) eight, (8,) eighteen, (18,) nineteen, (19,) twenty, (20,) twenty-one, (21,) twenty-two, (22,) and twenty-three, (23,) the west half of section twenty-five, (25,) all of sections twenty-six, (26,) twenty-seven, (27,) thirty-four, (34,) and thirty-five, (35), and the west half of section thirty-six, (36,) in township thirty-three, (33), south of range sixty-three west, also the west half of section one, (1,) and all of sections two, (2), and three, (3), in township thirty-four, (34,) south of range sixty-three, (63), west; also sections thirteen, (13,) and twenty-four. (24,) in township thirty-three, (33,) south of range sixty-four, (64), west. To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in any wise appertaining unto the said party of the second part, and unto his heirs and assigns, forever; the said Josephine Farnsworth hereby covenanting that she is lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that she has good right to convey the same; that the said premises are free and clear of any incumbrance done or suffered by her or those under whom she claims; and that she will warrant and defend the title to the said premises unto the said party of the second part, and unto his heirs and assigns, forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said party of the first part has hereunto set her hand and seal the day and year first above written.

JOSEPHINE FARNSWORTH. [SEAL.]

STATE OF MISSOURI, }
*City of St. Louis,* } ss.

Be it remembered, that on this nineteenth day of April, A. D. 1882, before the undersigned, a Notary Public within and for the city and county of St. Louis aforesaid, personally came Josephine Farnsworth, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and acknowledged the same to be her act and deed for the purposes therein mentioned. And the said Josephine Farnsworth further declared herself to be single and unmarried.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in St. Louis, the day and year first above written.

ENRIQUE PARMER,
*Notary Public.*

STATE OF MISSOURI, }
*City of St. Louis.* }

I, Charles F. Vogel, Clerk of the Circuit Court City of St. Louis, the same being a Court of Record, certify that Enrique Parmer, whose name is subscribed to the certificate, or proof of acknowledgment of the annexed instrument, dated 19th of April, 1882, was on said date an acting Notary Public in and for said city, duly commissioned and qualified, and authorized to take the same; that I am acquainted with his handwriting, and verily believe that the signature thereunto is genuine, and that to all such his official acts, full faith and credit are and ought to be given. I further certify that said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at office in the city
[SEAL]. of St. Louis, this 20th day of April, eighteen hundred and eighty-two.

CHARLES F. VOGEL,
*Clerk.*

[Endorsed.]

Warranty Deed from Josephine Farnsworth to Thomas J. Allen. Filed for record the 26th day of May A. D. 1882, at 11 o'clock, A. M. Recorded in book 15 at page 326-7-8. Jesus M. Garcia, Recorder, Nicanor D. Jaramillo, Deputy. Recorder's fees $2.50.

[EXHIBIT S.]

## WARRANTY DEED.

This indenture, made on the tenth day of April, A. D. one thousand eight hundred and eighty-two, by and between Eugene Leitensdorfer and Thomas Leitensdorfer, of Trinidad, State of Colorado, parties of the first part, and Thomas J. Allen, of the county of Jackson, in the State of Missouri, party of the second part:

Witnesseth: That said party of the first part, in consideration of the sum of twelve thousand dollars, to them paid by the said party of the second part (the receipt of which is hereby acknowledged), do, by these presents, grant, bargain and sell, convey and confirm, unto the said party of the second part, his heirs and assigns, the following described lots, tracts or parcels of land, lying, being and situate in the county of Las Animas, and State of Colorado, to-wit: All the west half of section thirteen (13), all of sections twenty-two (22), twenty-three (23), twenty-four (24), and twenty-seven (27); the east halves of sections twenty-eight (28), and thirty-two (32), and all of section thirty-three (33), in township thirty-two (32), south of range sixty-three (63), west of the sixth principal meridian; also, sections five (5), seven (7), eight (8), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), and twenty-three (23), the west half of section twenty-five (25), all of sections twenty-six (26), twenty-seven (27), thirty-four (34), and thirty-five (35), and the west half of section thirty-six (36), in township thirty-three, south of range sixty-three west; also, the west half of section one (1), and all of sections two (2), and three (3), in township thirty-four (34), south of range sixty-three (63), west; also, sections thirteen (13), and twenty-four (24), in township thirty-three (33), south of range sixty-four (64), west.

To have and to hold the premises aforesaid, with all and singular, the rights, privileges, appurtenances and immunities thereto belonging, or in any wise appertaining unto the said party of the second part, and unto his heirs and assigns, forever; the said grantors hereby covenanting that they lawfully seized of an indefeasible estate, in fee, in the premises herein conveyed; that they have good right to convey the same; and that they will warrant and defend the title to the said premises unto the said party of the second part, and unto his heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said parties of the first part have here-

unto set their hands and seals the day and year first above written.

EUGENE LEITENSDORFER, [SEAL.]
THOMAS LEITENSDORFER. [SEAL.]

Signed, sealed and delivered in presence of us.
W. R. WALKER,
P. RASCOVER.

STATE OF COLORADO, } ss.
*County of Las Animas,* }

Be it remembered that, on this fourteenth day of April, A. D. 1882, before the undersigned, a notary public within and for the county of Las Animas, and State of Missouri, personally came Eugene Leitensdorfer and Thomas Leitensdorfer, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and acknowledged the same to be their act and deed for the purposes therein mentioned.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my official seal, at office in Trinidad, the day and year first above written.

WILLIAM R. WALKER,
*Notary Public.*

STATE OF COLORADO, } ss.
*Las Animas County,* }

I, Henry F. Moore, clerk District Court within and for said county, in the State aforesaid, do hereby certify that William R. Walker, before whom the foregoing warranty deed was taken, was, at the date thereof, a notary public in and for the county of Las Animas, duly commissioned and qualified, and authorized by the laws of Colorado to sign the same, and that the same is taken in accordance with the laws of

[SEAL.] Colorado. I further certify that I am well acquainted with his handwriting, and verily believe the signature to the foregoing is genuine.

Witness my hand and official seal at Trinidad, in said county, this fifteenth day of April, A. D. 1882.

HENRY F. MOORE,
*Clerk.*

[Endorsed]

Warranty Deed from Eugene Leitensdorfer and Thos. Leitensdorfer to Thos. J. Allen. Filed for record the 14th day of April, A. D. 1882, at 2 o'clock 6 minutes, P. M. Recorded in book 15, at pages 205-6-7. Jesus Ma. Garcia, Recorder, by Nicanor D. Jaramillo, Deputy. Recorder's fees, $2.00.

[Exhibit T.]

Robert H. Bradford having been duly sworn, says:

When the derivative land claim of Thomas Leitensdorfer, under Cornelio Vigil and Ceran Saint Vrain, and the opposing claim of William Craig, to parts of the Las Animas grant (as involved in the case of Craig *v.* Leitensdorfer, in this Court), were before the register and receiver, Stanton and Cook, at Pueblo, Colorado, John Hallum proposed to retain me for the owners of the Leitensdorfer claim; I accepted the case by letter of the 26th of February, 1874, and have been the Washington attorney of the various owners ever since. After my employment the late Montgomery Blair was retained as my associate and filed one or more briefs before the executive branch of the Government here; but, for some years before his death, he did nothing in the case; he took no part in any Court proceedings. I have argued the case, in its varying aspects, before the General Land Office, the Interior Department, the Department of Justice, the Supreme Court of the District of Columbia and the Supreme Court of the United States; and in March, 1877, when I opposed, before the Solicitor of the Interior Department, the enforcement of President Grant's mandate of the 2d of March, 1877, ordering the delivery of the U. S. title to Craig for his derivative claim, Benjamin F. Butler, for Craig, met me in oral argument. Mr. Symes, of counsel for Craig, in the Circuit Court, has treated me as controlling the case for Leitensdorfer in this Court. I drew and signed the original and supplemental bills in the case, and filed a printed brief in the Court below. In the prayer to the supplemental bill I asked the Court to order the surrender of Craig's titles into the Court, and to cancel them, in order to prevent Craig from disposing of his fraudulent derivative claim to innocent third persons, and in order to leave the General Land Office free to ultimately allow the derivative claim of Thomas Leitensdorfer; but Mr. Hallum declined to enforce this part of the prayer.

I have had exclusive charge of the case in this Court, tho Mr. Hallum was admitted to the bar and entered his appearance for Leitensdorfor on the 8th of January, 1885, and, as it seems, afterwards made a stipulation with Benjamin F. Butler, attorney for Craig, the appellant, agreeing to the reversal of the decree below against Craig, tho expressly rendered on the ground of fraud in his title. These two proceedings constitute all that Mr. Hallum has done in this case before this Court. With these exceptions he and the other owners of Leitensdorfer's claim have relied on me to conduct the Washington end of the case as leading counsel.

Mr. Hallum was in my office here on the day of his admission

to the bar, and said he would take part in the argument of the case on the merits, and file a brief. We went over the whole case, but he never at any time, alluded to any stipulation, or intimated a wish that my connection with the case should end. I have never seen him but on the 8th of January, 1885, and knew nothing of the stipulation for reversal till after the adjournment of the last term of this Court. I disapproved it. According to Mr. Hallum's statements to me, Thomas Leitensdorfer, by a deed absolute in terms, had conveyed his claim to John Hallum, 7-16 for Hallum, to secure counsel for Leitensdorfer, &c., and 7-16 in trust for Leitensdorfer; and Hallum, by direct and mean conveyances, also absolute on their face, had conveyed the 9-16 to Josephine Farnsworth, Leitensdorfer's sister, 2-16 for her, and 7-16 in trust for Thomas. This, according to Mr. Hallum, was the state of the title at the time the first bill was filed in this case, and the deeds to and from him were drawn absolute, as he said, because there was great local hostility to Leitensdorfer and his claim, and Leitensdorfer feared to hold the title in his own name. Hallum did not hold himself responsible for my costs or fees, but seemed to rely on the other owners to pay them.

In the suit of widow Leann S. King, administratrix of the estate of her husband, John Q. A. King, against John Hallum and Thomas Leitensdorfer, No. 5093 in the District Court of the 2d judicial district of Colorado, for Arapahoe county, to recover a fee said to be due King for legal services in this case, below, Hallum's undivided 7-16 of Leitensdorfer's claim was attached on the 3d of January, 1881. On the 5th of January, 1882, judgment was entered against both defendants for $10,000, and afterwards, all of Leitensdorfer's claim was sold under the judgment, and bought in by Mrs. King. Under a writ of error sued out by Leitensdorfer, in which, it seems, Hallum took no part, the Supreme Court of Colorado affirmed the judgment below. Hallum seems to have abandoned the case of Craig *v.* Leitensdorfer soon after Mrs. King got judgment against him; for he wrote me on the 13th of January, 1882, saying he wished to come to Washington to push Leitensdorfer's claim before the Interior Department, (which I objected to as premature,) and expressing solicitude for the dismissal of Craig's first appeal to this court, which I assented to, but reluctantly because, as I had before stated to Mr. Hallum, if the first appeal should be dismissed before the lapse of 2 years from the decree below against Craig, he might take a second appeal within that time and so prolong the litigation, a result which has since occurred.

After Mr. Hallum's letter of the 13th of January, 1882, he had no further communication with me about this case, until the day he was admitted to the bar of this Court. On the 10th of April,

1882, Thomas Leitensdorfer, his brother and vendor, Eugene Leitensdorfer, and their sister, Mrs. Josephine Farnsworth, sold the derivative claim of Thomas Leitensdorfer to Thomas J. Allen, whom I also represent in this case.

ROBT. H. BRADFORD.

Sworn to and subscribed before me at Washington, D. C., this 28th of October, 1885.

{ NOTARIAL SEAL. }

EMMA M. GILLETT,
*Notary Public.*

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[EXHIBIT U.]

STATE OF COLORADO, }
*County of Las Animas,* } *ss.*

I, Thomas Leitensdorfer, of said county and State, being duly sworn according to law, upon my oath do state, that I am the original complainant of record in the certain cause now pending in the Supreme Court of the United States, wherein William Craig and others are defendants, which said cause was appealed from the circuit court of the United States for the District of Colorado. That, from the inception of said cause, and during its pendency, so long as I had anything to do with said cause, or any interest in its conduct or management, and until my interest in the subject matter of the same ceased by the sale and conveyance of my interest and right, title and estate therein to Mrs. Josephine Farnsworth (widow), resident in the city of Saint Louis, Missouri, Robert H. Bradford, of the city of Washington, D. C., was and has been the chief and leading counsel and solicitor for said complainant.

That, since the said transfer and conveyance to said Josephine Farnsworth by me, of date December 18th, 1880, I have had nothing to do with said cause and have had no counsel or solicitor, or other representative therein. That, some years ago, one John Hallum was engaged or retained by Eugene Leitensdorfer to prosecute the claims derived by grant and treaty to the lands in question, before the land office and proper departments of the United States, and said Hallum has long since, by various deeds, gifts and grants in money, been paid for whatever services he may have rendered in that regard; that said Hallum, whatever deeds or writings apparently of conveyance to him, from either myself or Eugene Leitensdorfer, may exist or be made to appear, never paid or gave any valuable consideration for said lands or landed interest, other than his, said Hallum's, assurances to prosecute said claims; and affiant further states that said Hallum has never, to affiant's knowledge, been the *bona fide* holder

or owner of any portion of said lands involved in said suit; and that all the deeds or writings conferring any interest or powers whatever upon or in said Hallum were in the nature of a trust, and were prepared and drawn by said Hallum, or under his direction.

Affiant further states that he never knew or authorized the making or filing of the certain stipulation in the above mentioned cause on the 4th day of May, 1885, by and between Benjamin F. Butler and said John Hallum, wherein and whereby it was agreed between said Hallum and Butler that the decree of the circuit court should be reversed, and the said cause remanded for dismissal; that the first knowledge of affiant that such action was either had or contemplated by anybody, came to affiant after the filing of the same. That said Hallum, on or about said May 4th, 1885, was neither the attorney, nor solicitor, nor agent, nor counsel, nor attorney in fact, of this affiant in said cause or out of it.

That affiant has nothing to do with said Hallum in any way affecting or concerning this said cause of Leitensdorfer against Craig since the 18th day of December, 1880. That whatever relations he may have previously had toward said cause, ceased, so far as affiant knows or is informed. in 1880; and affiant further states that he has not seen said Hallum since the day of December, 1881; and affiant has not received any letter from said Hallum since the day of 1880, concerning said suit, nor has affiant had any conversation with said Hallum concerning said suit since on or about the 18th day of December, 1880.

THOMAS LEITENSDORFER.

UNITED STATES OF AMERICA, }
*District of Colorado,* } *ss.*

I, Edward J. Hubbard, a commissioner of the United States, within and for said district, hereby certify that the above named Thomas Leitensdorfer swore to and subscribed to the above and foregoing affidavit and writing before me on this 13th day of June, 1885.

In testimony whereof I have hereunto set my hand.

EDWARD J. HUBBARD,
*U. S. Commissioner.*

*Trinidad, Colorado.*

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[EXHIBIT V.]

STATE OF COLORADO, }
*County of Las Animas.* } *ss.*

I, Edward J. Hubbard, a citizen of said county and State, of lawful age, being duly sworn according to law, do state that I am

acquainted with Thomas Leitensdorfer, the original complainant and present appellee in the certain cause wherein William Craig *et al.* are appellants, said cause being now pending in the Supreme Court of the United States on appeal from the circuit court of the United States for the District of Colorado, and have been so acquainted with said Leitensdorfer for 16 years. I am also acquainted with one John Hallum, who I understand now claims to be the lawful attorney and solicitor in said cause for said Thomas Leitensdorfer and other parties in interest; I have known said Hallum for about 6 or 8 years. I first made the acquaintance of said Hallum in said Las Animas county, where I understood from him and also from public and general current report that he (said Hallum) was endeavoring to and had undertaken to prosecute before the Land Department of the United States the certain claim or right derived by Eugene Leitensdorfer from the authorities of Mexico to a portion of the Mexican grant known as the "Vigil and Saint Vrain Grant," the portion of said grant claimed by said Leitensdorfer being situated in said Las Animas county. I have for a number of years past from the exigencies of my occupation and otherwise become more or less familiar with the litigation and various phases of the same arising out of said Leitensdorfer claim and with the persons engaged or interested therein.

I have always understood and have never heard to the contrary from Hallum himself or from anybody else, that Hallum's interest in said grant or lands, whatever it was, was only that of an attorney-at-law, who was to receive for his services in the successful prosecution and establishment of the rights of said Leitensdorfer and assignees as aforesaid in and to the lands claimed, a portion or share of the lands themselves. I have had some correspondence myself with said Hallum in relation to the said Leitensdorfer grant, and in 1881 or 1882 I received a letter from said Hallum addressed to myself and dated at Lonoke or some point in the State of Arkansas, in which letter to me said Hallum stated in substance that he (Hallum) had no more to do with the Leitensdorfer case and was out of it, that is, said case.

The only "case" that could possibly be meant or intended by said Hallum in his said letter and the case I understood him to mean was the said case now on appeal and pending in said Supreme Court of the United States of Leitensdorfer *vs.* Craig *et al.* I have searched for said letter mentioned in all places where it is likely I would have placed said letter, had it been kept by me, and where all my letters are usually kept and placed, and I am unable to find said letter; I believe said letter to be destroyed. I know said John Hallum's hand-writing. There was exhibited to me also in the year 1881 or 1882, I cannot from memory state positively as to the year, a letter written by said Hallum to

Eugene Leitensdorfer in relation to the said cause of Leitensdorfer *vs.* Craig, in which letter said Hallum stated in substance that unless he was furnished money to pay his expenses to Washington, D. C., he (Hallum) would have no more to do with the case. I at present hold the office of a commissioner of the district court of the United States within and for the district of Colorado. I have no interest directly or indirectly in the said suit.

EDWARD J. HUBBARD.

STATE OF COLORADO, } *ss.*
*County of Las Animas.* }

I, E. Bingham, a Notary Public, hereby certify that the above named Edward J. Hubbard swore to and subscribed to the above and foregoing affidavit and writing before me, on this 20th day of June, 1885.

In testimony whereof I have hereunto set my hand.

[SEAL.] E. BINGHAM,
*Notary Public.*

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[EXHIBIT W.]

STATE OF MISSOURI, } *ss.*
*County of Jackson,* }

I, Thomas J. Allen, of the county of Jackson, State aforesaid, being duly sworn according to law, upon my oath do state that I am the assignee and vendee, by deed of warranty of the certain lands and hereditaments known as the Leitensdorfer grant and also as the Las Animas grant, and situate in the county of Las Animas, and State of Colorado, and have been such since the 10th day of April, 1882; that, shortly after the acquirement by affiant of said lands and the titles thereto, affiant retained and employed Robert H. Bradford, esquire, counsellor at law, of Washington, D. C., as affiant's attorney and counsel in Washington in and to attend to and represent affiant and affiant's interests involved in the certain cause then and before pending in the Supreme Court of the United States, wherein William Craig was appellant and Thomas Leitensdorfer appellee; that said Bradford, as affiant was informed and understood, had long been the leading counsel and attorney in said cause on behalf of the original complainant and the parties in interest in said suit, not only in said Supreme Court, but in the court below, from the inception of said suit. That, until lately informed through said Bradford, his counsel, affiant was wholly ignorant of the certain stipulation between Benjamin F. Butler and John Hallum and filed, as affiant is informed, on the 4th day of May, 1885, in said suit so pending in the Supreme Court of the United States,

wherein and whereby said Butler and Hallum agreed to the reversal of the decree of the circuit court, from which said appeal in Craig, appellant, against Leitensdorfer, appellee, was taken, and also to the remanding of the said cause and the dismissal of the bill therein; and affiant further states that neither he, nor any person in his behalf, or by his authority, ever authorized such stipulation and agreement, either in whole or in part, and that the same, by whomsoever made, was and is wholly unwarranted and unauthorized, so far as affiant and his interests and estate, as aforesaid, are concerned. That said John Hallum is not now, was not on said 4th day of May, 1885, or at any time prior or subsequent to said date, either the attorney or solicitor of affiant in said cause, nor was he the attorney in fact, of this affiant in any respect whatever; that affiant does not know said Hallum and never saw him.

Affiant states that he has no personal knowledge that said Hallum ever was interested in or connected with said cause as an attorney, either in law or in fact, but if he was so connected, such connection wholly ceased upon the purchase of said lands and interests by said Allen, on April 10th, 1882.

Affiant further states that the making of said stipulation, the filing the same, and the enforcing the same, should it be enforced by the court, would inflict a great and grievous wrong upon affiant, and deprive him of his property, in the acquiring and maintaining of which he has expended large sums of money.

THOMAS J. ALLEN.

UNITED STATES OF AMERICA, }
*Western District of Missouri,* } *ss.*

I, Fred. W. Perkins, a commissioner of the United States within and for said district, hereby certify that the above named Thomas J. Allen swore to and subscribed to the above and foregoing affidavit and writing before me on this 11th day of June, 1885.

In testimony whereof I hereunto set my hand and official seal.

[SEAL.]

FRED. W. PERKINS,
*Comr. U. S. Cir. Ct., West. Dist. of Mo.*

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[EXHIBIT X.]

STATE OF MISSOURI, }
*City of St. Louis.* } *ss.*

I, Josephine Farnsworth, (widow,) of the city and state aforesaid, being first duly sworn, upon my oath do state: that I am the

person, to whom was conveyed by Thomas Leitensdorfer, by his certain deed to me of date December 18th, 1880, duly acknowledged and recorded, the certain lands, tenements and hereditaments, situate in the county of Las Animas and State of Colorado, and am also the person to whom sundry other deeds of grant have been made by various other persons, at different periods during the past twelve years, of various valuable interests in and to said lands and tenements, in the county and State aforesaid, and known generally as the Leitensdorfer or Las Animas grant. That on the 10th day of April, 1882, I, by my deed of warranty duly executed, sold and conveyed said lands and all my right, title and interest therein, to Thomas J. Allen, of Jackson county, Missouri, said lands being the identical lands the title to which is in controversy in the certain suit now pending in the Supreme Court of the United States, wherein William Craig is appellant and Thomas Leitensdorfer appellee, on appeal from the circuit court of the United States for the district of Colorado.

I further state that for several years past and to the best of my knowledge from the beginning of said suit in said circuit court of the United States, Robert H. Bradford, Esquire, of Washington, D. C., has been in charge of the direction and management of said suit and the leading counsel and solicitor therein for complainant and for myself, so far as my interests have been involved therein. Mr. John Hallum was never my solicitor in said case nor my attorney therein. I never knew of or authorized the making or filing in said cause in said Supreme Court of the certain stipulation in writing on and about the 4th day of May, 1885, between Benjamin F. Butler and John Hallum, purporting to agree to a reversal of the decree in said cause, and the remanding of the same to the circuit court for the district of Colorado for dismissal therein, nor did I know of any such action being thought of or attempted until after the filing of said stipulation. Mr. John Hallum had no authority from me to make or agree to such stipulation or any stipulation or agreement whatever.

And affiant further declares that she has not seen said Hallum since January, 1882, or conversed with him or communicated with him, since then, in any way in reference to this suit, or upon any matter whatever. Said Bradford was always her attorney and counsel in this suit, and for the last 10 or 12 years as leading counsel, has had sole and entire charge of the same; and he, and he alone, had authority to act for her in all matters pertaining to the said suit.

JOSEPHINE FARNSWORTH.

UNITED STATES OF AMERICA, }
*Eastern District of Missouri.* } *ss.*

I, Lucien Eaton, a commissioner of the circuit court of the

United States within and for said district, hereby certify that the above named Josephine Farnsworth swore to and subscribed to the above and foregoing affidavit and writing before me, on this eighth day of June, 1885. In testimony whereof I have hereunto set my hand the day and year last aforesaid.

LUCIEN EATON,
*Commissioner.*

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[EXHIBIT Y.]

STATE OF MISSOURI, }
*City of St. Louis.* } *ss.*

I, Eugene Leitensdorfer, of lawful age, being duly sworn according to law, upon my oath do state, that I am the person to whom the annexed letter, marked exhibit "a" and dated Lonoke, Ark., Feb. 18th, 1882, is addressed at Starkville, Colorado, and subscribed John Hallum, which letter is hereby referred to. Affiant received said letter at Starkville, in Las Animas county, State of Colorado, by due course of mail. Affiant states that he did not, nor did any one for him, furnish said Hallum means, as requested in said letter, to go to Washington, and affiant has had no communication since the receipt of said letter with said Hallum in relation to the matter therein referred to. Affiant further states that the writer of said letter is John Hallum, and is the same person who has lately, as affiant understands, signed or filed an alleged stipulation or agreement in the case of Craig, appellant, *vs.* Leitensdorfer *et al.*, appellees, now pending in the Supreme Court of the United States on appeal from the circuit court of the United States for the district of Colorado. Affiant has now no valuable interest in said litigation or in the subject matter thereof. Affiant never authorized nor attempted to authorize either for himself or others any such stipulation or agreement in said cause by said Hallum, nor did he know of the same until after the filing thereof.

EUGENE LEITENSDORFER.

Attest: LUCIEN EATON.

UNITED STATES OF AMERICA, }
*Eastern District of Missouri.* } *ss.*

I, Lucien Eaton, a commissioner of the circuit court of the United States within and for said district, do hereby certify that the above named Eugene Leitensdorfer swore to and subscribed to the above and forefoing affidavit and writing before me, on this 19th day of June, 1885. The Affiant is blind.

In testimony whereof I have hereunto set my hand.

LUCIEN EATON.
*Com. of the U. S. Circuit Court., East. Dis. of Mo.*